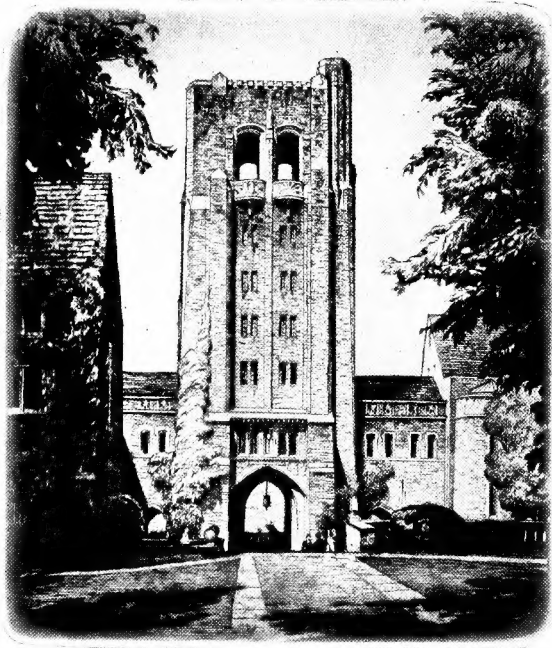


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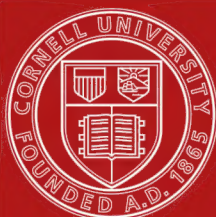
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**FEDERAL CRIMINAL LAW
AND PROCEDURE**

VOLUME TWO

FEDERAL CRIMINAL LAW AND PROCEDURE

BY

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IN THREE VOLUMES

VOLUME TWO

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FEDERAL CRIMINAL LAW AND PROCEDURE

VOLUME TWO

CHAPTER XLVI

CRIMINAL CODE, CHAPTER ONE

OFFENSES AGAINST THE EXISTENCE OF THE GOVERNMENT

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- § 663. Crim. Code § 2. Punishment of Treason.
- § 664. Crim. Code § 3. Misprision of Treason.
- § 665. Crim. Code § 4. Inciting or Engaging in Rebellion or Insurrection.
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- § 668. Crim. Code § 7. Recruiting Soldiers or Sailors to Serve against the United States.
- § 669. Crim. Code § 8. Enlistment to Serve against the United States.

§ 662. Criminal Code. Sec. 1. Treason.

Whoever, owing allegiance to the United States, levies war against them or adheres to their enemies, giving them aid and comfort within the United States or elsewhere, is guilty of treason.¹

Article III, Section 3 of the Constitution of the United States provides as follows: "Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort." In general when war exists, any act clearly indicating a want of loyalty to the government, and sympathy with its enemies, and which by fair construction is directly in furtherance of their hostile designs, gives

§ 662. ' Formerly R. S. Sec. 5331, 35 Stat. L. 1088.

them aid and comfort. Or, if this be the natural effect of the act, though prompted solely by the expectation of pecuniary gain, it is treasonable in its character.² "Words oral, written or printed, however treasonable, seditious or criminal of themselves, do not constitute overt acts of treason."³ This crime can be committed only by a person who owes allegiance to the United States.⁴ An insurrection of armed men to prevent by force and intimidation the execution of an act of Congress is levying war against the United States.⁵ One whose oath of allegiance is void because it was taken in accordance with a provision which was legally ineffectual cannot be held for treason.⁶ The terms "levying war" and "adhering to their enemies, giving them aid and comfort" are borrowed from the ancient law of England, and are to be understood in the sense which they bore in England when the constitution was adopted.⁷ But to constitute a levying of war, within the meaning of the constitutional definition, it is not sufficient that there should be an assembly of persons to consult about means of levying war at some future time or contingency without any present force. This is a mere conspiracy to levy war. To actually levy war some overt act must be done and some attempt with force to execute the purpose. If, however, the assembly is armed in military manner, that will be the overt act.⁸ Levying war necessitates that there be an assemblage of persons for the purpose of effecting by force a treasonable purpose. The mere enlistment of men to serve against the government is not a crime. The traveling of individuals to the place of rendezvous is not sufficient, but the meeting of bodies of men and their marching from places of partial, to places of general, rendezvous constitutes a levying of war.⁹ "War can only be

² Judge Leavitt, 1 Bond 609, 30 Fed. Cas. No. 1036.

³ Judge Nelson in his charge to the Grand Jury, 5 Blatchf. 550, Fed. Cas. No. 18271, *criticized* in *United States v. Werner*, 247 Fed. 708.

⁴ *United States v. Wiltberger*, 5 Wheat. (U. S.) 76, 96, 5 L. ed. 37.

⁵ *United States v. Mitchell*, 2 Dallas (U. S.), 348, 1 L. ed. 410.

⁶ *United States v. Villato*, 2 Dallas (U. S.), 370, 1 L. ed. 377.

⁷ Charge to Grand Jury, 2 Wall. Jr. (U. S.) 134, Fed. Cas. No. 18276.

⁸ Charge to Grand Jury, 1 Story, 614, Fed. Cas. No. 18275.

⁹ *Ex parte Bollman*, 4 Cranch (U. S. C. C.), 75, 2 L. ed. 554.

levied by the employment of actual force. Troops must be embodied, men must be assembled, in order to levy war.”¹⁰ Levying war cannot exist if but one man carrying arms, regardless of his intent, sets out to do a treasonable act, but an assemblage of armed men with intent to do such a treasonable act comes within the definition.¹¹ The assembling of bodies of armed men for purposes of a private nature is not treason. The criterion is the intention with which the people assembled. When the intention is to prevent by force the execution of any United States statute, it is levying war. On the other hand, the commission of any number of felonies, riots, or misdemeanors cannot alter their nature so as to make them amount to treason.¹² If a person is present, directing, aiding, counseling, or countenancing treason, though absent at the time when the act of violence was committed, he is guilty of the crime because he instigated it or devised the means for carrying it into effect.¹³ “It is not essential to constitute the giving of aid and comfort that the enterprise commenced should be successful and actually render assistance.”¹⁴ “Enemies” has reference to subjects of a foreign power in actual hostility, and does not include rebels in insurrection.¹⁵ To be employed in actual service in an army raised to oppose the government in its action or to aid in the levying or embodying of a military force for the subversion of the government are acts of levying war. But mere expression of opinion indicating sympathy with the enemy does not warrant a conviction. It is not “adhering to their enemies, giving them aid or comfort” since that requires an overt act.¹⁶ An insurrection of an armed force, the object of which is to render void an Act of Congress carried on by seizing the persons of public officers and compelling them to swear that they no longer will act as such, is high treason

¹⁰ Chief Justice Marshall in *United States v. Burr*, 4 Cranch (Appendix) (U. S. C. C.), 455; 25 Fed. Cas. No. 14692, p. 13.

¹¹ *United States v. Burr*, 25 Fed. Cas. No. 14693, p. 169; *United States v. Bollman*, 1 Cranch (C. C.), 373, 24 Fed. Cas. No. 14622, p. 1193.

¹² *Case of Fries*, Fed. Cas. No. 5127.

¹³ *Charge to Grand Jury*, 2 Wall. Jr. (U. S.), 134, Fed. Cas. No. 18276.

¹⁴ *United States v. Greathouse*, 4 Sawy. 457, 26 Fed. Cas. No. 15254, p. 24.

¹⁵ *United States v. Greathouse*, *supra*.

¹⁶ Judge Leavitt's charge to Grand Jury, 1 Bond, 609, 30 Fed. Cas. No. 18272.

by levying war against the government.¹⁷ A bench warrant against any person charged with treason may be issued by the Federal Courts on *ex parte* affidavits.¹⁸ The jury must first be satisfied beyond a reasonable doubt that the defendant has committed treason before they can find him guilty thereof.¹⁹ Evidence showing the intention to resist the enforcement of a law of the United States is evidence in chief and cannot be received in rebuttal.²⁰ Judge Learned Hand of the Southern District of New York in a recent case²¹ traced the history of the law of treason from the earliest time to the time of Henry VIII. After a careful review of the authorities he reached the conclusion that a conviction for treason cannot be obtained upon the testimony of only one witness even though the witness is corroborated by circumstantial evidence of a most convincing character; nor are two separate and distinct overt acts each supported by but one witness sufficient; that the government must produce two direct witnesses to the whole overt act and that each part of the overt act must have the support of at least two oaths. Other courts held likewise since the creation of the Government. Mr. Justice Iredell said: "With regard to the number of witnesses in treason, I am of opinion that two are necessary on the indictment as well as upon the trial in court."²² Chief Justice Marshall said: "It was said that if the overt act was not proved by two witnesses, no testimony in its nature corroborative or confirmatory was admissible or could be relevant. From that declaration there is certainly no departure."²³

§ 663. Criminal Code. Sec. 2. Punishment of Treason.

Whoever is convicted of treason shall suffer death; or, at the discretion of the court, shall be imprisoned not less

¹⁷ United States *v.* Vigol, 2 Dallas (U. S.), 346, 1 L. ed. 409.

¹⁸ United States *v.* Bollman, 1 Cranch (C. C.), 373, 24 Fed. Cas. No. 14622.

¹⁹ United States *v.* Fricke, 259 Fed. 673.

²⁰ United States *v.* Hanway, 2 Wall, Jr. (C. C.), 139, 26 Fed. Cas. No. 15299.

²¹ United States *v.* Robinson, 259 Fed. 685. To the same effect, *see* United States *v.* Fricke, 259 Fed. 673 (Charge to Jury).

²² United States *v.* Fries, 3 Dall. (Pa.) 515, 1 L. ed. 701, 9 Fed. Cas. No. 5126.

²³ United States *v.* Burr, 25 Fed. Cas. No. 14693, p. 179.

than five years and fined not less than ten thousand dollars, to be levied on and collected out of any or all of his property, real and personal, of which he was the owner at the time of committing such treason, any sale or conveyance to the contrary notwithstanding; and every person so convicted of treason shall, moreover, be incapable of holding any office under the United States.¹

A person accused under this section may be admitted to bail.² The death penalty may be waived in the discretion of the court.³

§ 664. Criminal Code. Sec. 3. Misprision of Treason.

Whoever, owing allegiance to the United States and having knowledge of the commission of any treason against them, conceals and does not, as soon as may be, disclose and make known the same to the President or to some judge of the United States, or to the governor or to some judge or justice of a particular state, is guilty of misprision of treason and shall be imprisoned not more than seven years and fined not more than one thousand dollars.¹

“No crime is greater than treason. He who being bound by his allegiance to a government sells goods to an armed combination to overthrow that government, knowing that the purchaser buys them for a treasonable purpose, is guilty of treason or misprision thereof. He voluntarily aids the treason. . . .”²

§ 665. Criminal Code. Sec. 4. Inciting or Engaging in Rebellion or Insurrection.

Whoever incites, sets on foot, assists, or engages in any rebellion or insurrection against the authority of the United States or the laws thereof, or gives aid or comfort thereto, shall be imprisoned not more than ten years, or fined not more than ten thousand dollars, or both; and

§ 663. ¹ Formerly R. S. Sec. 5332, 35 Stat. L. 1088.

² Davis's Case, 7 Fed. Cas. No. 3621 a.

³ United States v. Greathouse, 4 Sawy. 457, 26 Fed. Cas. No. 15254.

§ 664. ¹ Formerly R. S. § 5333, 35

Stat. L. 1088. This section was held to require no judicial construction. Charge to Grand Jury, 1 Bond, 609, 30 Fed. Cas. No. 18272.

² Mr. Justice Bradley in Hanauer v. Doane, 12 Wall. (U. S.) 342, 20 L. ed. 439.

shall, moreover, be incapable of holding any office under the United States.¹

It is sufficient for the indictment to follow the language of the statute and it need not specifically allege the phrase "levying war." ²

§ 666. Criminal Code. Sec. 5. Criminal Correspondence with Foreign Governments.

Every citizen of the United States, whether actually resident or abiding within the same, or in any place subject to the jurisdiction thereof, or in any foreign country, without the permission or authority of the Government, directly or indirectly, commences or carries on any verbal or written correspondence or intercourse with any foreign government or any officer or agent thereof, with an intent to influence the measures or conduct of any foreign government or of any officer or agent thereof, in relation to any disputes or controversies with the United States, or to defeat the measures of the Government of the United States; and every person, being a citizen of or resident within the United States, or in any place subject to the jurisdiction thereof, and not duly authorized, counsels, advises, or assists in any such correspondence with such intent, shall be fined not more than five thousand dollars and imprisoned not more than three years; but nothing in this section shall be construed to abridge the right of a citizen to apply, himself or his agent, to any foreign government or the agents thereof for redress of any injury which he may have sustained from such government or any of its agents or subjects.¹

This is the only crime for which one may be punished when the criminal act was committed in a foreign country.² The writing of a letter to a member of the British Parliament urging recognition of the Southern Confederacy is a crime under this section.³

§ 665. ¹ Formerly R. S. Sec. 5334, 35 Stat. L. 1088.

² *United States v. Greathouse*, 4 Sawy. 457, 26 Fed. Cas. No. 15254.

§ 666. ¹ Formerly R. S. Sec. 5335, 35 Stat. L. 1088.

² *American Banana Co. v. United Fruit Co.*, 213 U. S. 347, 356, 53 L. ed. 826, 29 S. C. 511.

³ *Charge to Grand Jury*, 2 Sprague, 285, Fed. Cas. No. 18277.

§ 667. Criminal Code. Sec. 6. Seditious Conspiracy.

If two or more persons in any State or Territory, or in any place subject to the jurisdiction of the United States, conspire to overthrow, put down, or to destroy by force the Government of the United States, or to levy war against them, or to oppose by force the authority thereof, or by force to prevent, hinder, or delay the execution of any law of the United States, or by force to seize, take, or possess any property of the United States contrary to the authority thereof, they shall each be fined not more than five thousand dollars, or imprisoned not more than six years, or both.¹

This section was held to be constitutional.² The indictment must charge the use of force which cannot be implied from the words "feloniously, unlawfully, wilfully and maliciously."³ An indictment under this section alleging both a conspiracy to overthrow and destroy the government of the United States and to levy war against it does not necessitate the government proving both, but merely either.⁴ In an indictment under this section, the act of one conspirator in furtherance of the common purpose is evidence against all. Until the enactment of this section in 1861, no means existed of retarding the progress of conspirators, nor to hold them for any crime, until an overt act was committed regardless of how far their nefarious plans had advanced.⁶ To convict a person of conspiracy for opposing by force the authority of the United States, it is not enough that the law of the United States has been violated but the conspiracy must contemplate a forcible resistance to their authority as a government; to convict a person for preventing by force the execution of any law of the United States there must be a forcible resistance while the government is endeavoring to execute its laws. The expulsion of Chinese from a town is not in violation of either of these two

§ 667. ¹ Formerly R. S. Sec. 5336, 35 Stat. L. 1089.

² In re Impaneling, Grand Jury, 26 Fed. 749. See also, CONSPIRACY, Chapter.

³ Phipps v. United States, 251 Fed. 879, 164 C. C. A. 95 (4th Cir.).

⁴ Bryant v. United States, 257 Fed. 378 (C. C. A. 5th Cir.).

⁵ Isenhauer v. United States, 256 Fed. 842 (C. C. A. 6th Cir.).

⁶ Charge to Grand Jury, 1 Bond, 609, Fed. Cas. No. 18272; 2 Sprague, 285, Fed. Cas. No. 18277.

clauses.⁷ It was recently held that under this section, proof of an overt act was not required to convict, and that a conviction may be had upon the uncorroborated testimony of an accomplice.⁸

§ 668. Criminal Code. Sec. 7. Recruiting Soldiers or Sailors to Serve against United States.

Whoever recruits soldiers or sailors within the United States, or in any place subject to the jurisdiction thereof, to engage in armed hostility against the same, or opens within the United States, or in any place subject to the jurisdiction thereof, a recruiting station for the enlistment of such soldiers or sailors to serve in any manner in armed hostility against the United States, shall be fined not more than one thousand dollars and imprisoned not more than five years.¹

The purpose of passing this section was to supply a defect in the law of 1790, which did not in terms punish the recruiting or enlisting sailors for the service of the enemy and therefore further legislation was necessary to effect suitable punishment for such conduct.²

§ 669. Criminal Code. Sec. 8. Enlistment to Serve against the United States.

Every person enlisted or engaged within the United States or in any place subject to the jurisdiction thereof, with intent to serve in armed hostility against the United States, shall be fined one hundred dollars and imprisoned not more than three years.¹

⁷ *Baldwin v. Franks*, 120 U. S. 678, 30 L. Ed. 766, 7 S. C. 656.

⁸ *Orear, et al. v. United States*, 261 Fed. 257 (C. C. A. 5th Cir.).

§ 668. ¹ Formerly R. S. Sec. 5337, 35 Stat. L. 1089.

² Charge to Grand Jury, 1 Bond, 600, 30 Fed. Cas. No. 18272; 2 Sprague, 292, 30 Fed. Cas. No. 18274.

§ 669. ¹ Formerly R. S. § 5338, 35 Stat. L. 1089.

CHAPTER XLVII

CRIMINAL CODE, CHAPTER TWO

OFFENSES AGAINST NEUTRALITY

- § 670. Crim. Code § 9. Accepting a Foreign Commission.
- § 671. Crim. Code § 10. Enlisting in Foreign Service.
- § 672. Crim. Code § 11. Arming Vessels against People at Peace with the United States.
- § 673. Crim. Code § 12. Augmenting Force of Foreign Vessel of War.
- § 674. Crim. Code § 13. Military Expeditions against People at Peace with the United States.
- § 675. Crim. Code § 14. Enforcement of Foregoing Provisions.
- § 676. Crim. Code § 15. Compelling Foreign Vessels to Depart.
- § 677. Crim. Code § 16. Armed Vessels to Give Bond on Clearance.
- § 678. Crim. Code § 17. Detention by Collectors of Customs.
- § 679. Crim. Code § 18. Construction of This Chapter.

§ 670. Criminal Code. Sec. 9. Accepting a Foreign Commission.

Every citizen of the United States who, within the territory or jurisdiction thereof, accepts and exercises a commission to serve a foreign prince, state, colony, district or people, in war, by land or by sea, against any prince, state, colony, district or people, with whom the United States are at peace, shall be fined not more than two thousand dollars and imprisoned not more than three years.¹

This section does not merely apply to a state recognized politically. The words "colony, district, or people", make it a crime to aid any warring factions contending for dominion.² The commission may be conferred by any district or association of

§ 670. ¹ Formerly R. S. Sec. 5281,
35 Stat. L. 1089.

² United States v. The Lucy H.,
235 Fed. 610.

people whose right to confer it shall be recognized by the person appointed. Only a citizen of the United States can commit a violation of these laws, and an overt act must have been committed under the commission.³ The effect on citizenship of the acts of the defendant is determined largely by the particular facts in the case.⁴

§ 671. Criminal Code. Sec. 10. Enlisting in Foreign Service.

Whoever, within the territory or jurisdiction of the United States, enlists or enters himself or hires or retains another person to enlist or enter himself, or to go beyond the limits or jurisdiction of the United States with intent to be enlisted or entered in the service of any foreign prince, State, colony, district, or people as a soldier or as a marine or seaman on board of any vessel of war, letter of marque, or privateer shall be fined not more than \$1000 and imprisoned not more than three years; *Provided*, That this section shall not apply to citizens or subjects of any country engaged in war with a country with which the United States is at war, unless such citizen or subject of such foreign country shall hire or solicit a citizen of the United States to enlist or go beyond the jurisdiction of the United States with intent to enlist or enter the service of a foreign country. Enlistments under this proviso shall be under regulations prescribed by the Secretary of War.¹

Whether the defendant "hired or retained" other persons is a question for the jury.² This section does not apply to individuals who go abroad voluntarily to enlist in a foreign army.³ It is

³ Charge to Grand Jury, 2 McLean, 1, 30 Fed. Cas. No. 18265.

⁴ Talbot v. Janson, 3 Dallas (U. S.), 133, 1 L. ed. 540; Juando v. Taylor, 2 Paine, 652, 13 Fed. Cas. No. 7558; Williams Case, 29 Fed. Cas. No. 17708.

§ 671. ¹ Formerly R. S. § 5282, 35 Stat. L. 1089.

² United States v. Blair-Murdock Co., et al., 228 Fed. 77; Blair v.

United States, 241 Fed. 217, 154 C. C. A. 137 (9th Cir.); In re Addis, 252 Fed. 886.

³ United States v. Nunez, 82 Fed. 599; United States v. O'Brien, 75 Fed. 900, United States v. Kazinski, Fed. Cas. No. 15508; United States v. Wiborg, 73 Fed. 159, judgment modified in 163 U. S. 632, 41 L. ed. 289, 16 S. C. 1127.

not essential to a violation of this section that a state of war should exist anywhere at the time of such violation.⁴

§ 672. Criminal Code. Sec. 11. Arming Vessels against People at Peace with the United States.

Whoever, within the territory or jurisdiction of the United States, fits out and arms, or attempts to fit out and arm, or procures to be fitted out and armed, or knowingly is concerned in the furnishing, fitting out, or arming of any vessel, with intent that such vessel shall be employed in the service of any foreign prince or state, or of any colony, district, or people, to cruise or commit hostilities against the subjects, citizens, or property of any foreign prince or state, or of any colony, district, or people, with whom the United States are at peace, or whoever issues or delivers a commission within the territory or jurisdiction of the United States for any vessel, to the intent that she may be so employed, shall be fined not more than ten thousand dollars and imprisoned not more than three years. And every such vessel, her tackle, apparel, and furniture, together with all materials, arms, ammunition, and stores which may have been procured for the building and equipment thereof, shall be forfeited; one half to the use of the informer and the other half to the use of the United States.¹

The statute was undoubtedly designed in general to secure neutrality in wars between two other nations, or between contending parties recognized as belligerents, but its operation is not necessarily dependent on the existence of such state of belligerency.² There is a distinction between recognition of belligerency and recognition of a condition of political revolt. Belligerency is recognized when a political struggle has attained a certain magnitude and affects the interests of the recognizing power; and in the instance of maritime operations, recognition

⁴ *United States v. Blair-Murdock Co., et al.*, 228 Fed. 77; *Blair v. United States*, 241 Fed. 217, 154 C. C. A. 137 (9th Cir.).

§ 672. ¹ Formerly R. S. Sec. 5283, 35 Stat. L. 1090.

² *Wiborg v. United States*, 163 U. S. 632, 41 L. ed. 289, 16 S. C. 1018; *United States v. The Three Friends*, 166 U. S. 1, 41 L. ed. 897, 17 S. C. 495.

may be compelled, or the vessels of the insurgents, if molesting third parties, may be pursued as pirates.³ It is not essential that some one should be first convicted before a forfeiture could be declared under this section.⁴ It is the duty of the political department to determine when belligerency shall be recognized and its action must be accepted according to the terms and intentions expressed.⁵ Where the Government has not recognized a state of war existing between two factions, the fitting out of a vessel with intent to enter the service of one or the other is not within the scope of the neutrality laws.⁶ An expedition proceeding in different parts to a rendezvous on the high seas and proceeding thence to Hayti for the aid of insurgents is a violation of the neutrality laws as if it had been completed on one single vessel.⁷ Where a vessel is used to transport arms and ammunition but is not equipped, fitted out or armed as a war vessel, the act cannot be held indictable under this statute.⁸ The words "colony, district or people" mean a body of persons whom it was impracticable to recognize politically.⁹ To constitute a conspiracy under this statute the scheme must be organized within, started from, and carried out from the United States.¹⁰ Where the evidence

³ *United States v. The Three Friends*, 166 U. S. 1, 49 L. ed. 897, 17 S. C. 495.

⁴ *United States v. The Three Friends*, 166 U. S. 1, 41 L. ed. 897, 17 S. C. 495.

⁵ *United States v. The Three Friends*, 166 U. S. 1, 41 L. ed. 897, 17 S. C. 495; *Gelston v. Hoyt*, 3 Wheat. (U. S.) 246, 324, 4 L. ed. 381; *United States v. Palmer*, 3 Wheat. (U. S.) 610, 635, 4 L. ed. 471; *Kennett v. Chambers*, 14 How. 38, 14 L. ed. 316, Whart. Int. Law Dig. pp. 551, 552; *The Ambrose Light*, 25 Fed. 408; *United States v. The Three Friends*, 78 Fed. 175.

⁶ *The Conserva*, 38 Fed. 431; *The Carondelet*, 37 Fed. 799, 800; *The Itata*, 56 Fed. 505, 512, 5 C. C. A. 608 (9th Cir.); *The Three Friends*, 78 Fed. 175.

⁷ *United States v. The Mary N.*

Hogan, 18 Fed. 529; *United States v. 214 Boxes of Arms, etc.*, 20 Fed. 50; *United States v. Quincy*, 6 Peters (U. S.), 445, 8 L. ed. 458; *United States v. Gooding*, 12 Wheat. (U. S.) 460, 472; 6 L. ed. 693, *but see The Robert and Winnie*, 47 Fed. 84.

⁸ *United States v. Trumbull, et al.*, 48 Fed. 99; *United States v. The Itata*, 49 Fed. 646; *United States v. The Itata*, 56 Fed. 505, 5 C. C. A. 608 (9th Cir.); *United States v. O'Brien, et al.*, 75 Fed. 900.

⁹ *United States v. The Three Friends*, 166 U. S. 1, 41 L. ed. 897, 17 S. C. 495; *United States v. The Lucy H.*, 235 Fed. 610; *United States v. The Itata*, 56 Fed. 505, 511, 5 C. C. A. 608 (9th Cir.); *United States v. Quincy*, 6 Peters (U. S.), 445, 467, 8 L. ed. 458.

¹⁰ *United States v. Trumbull, et al.*, 48 Fed. 99; *United States v.*

tends to show that acts of hostility are intended and contemplated, within the United States, and the vessel sails with that purpose, although no overt act of placing arms or ammunition on a vessel has been committed, it is in violation of the neutrality laws of the United States.¹¹ The intention with respect to the employment of a vessel, if a hostile one, must be formed within the United States and must be a fixed intention to violate the neutrality laws.¹² A vessel seized in violation of the neutrality laws may or may not be released on bond at the discretion of the court.¹³ Where a vessel proceeds on a peaceful purpose and later through fraud or compulsion is forced to a belligerent mission, it is held not to violate the neutrality laws of the United States.¹⁴ Where the transaction is an official one in behalf of an independent government with which our own government is at peace, it does not fall within the meaning of the neutrality laws.¹⁵ A consul of an overthrown government cannot be compelled to testify as a witness for the United States in a proceeding against certain persons for the violation of the neutrality laws where these persons represent or represented the new government which has been recognized by the United States.¹⁶ Intervention by a consul in the interest of his government is proper.¹⁷ It is not an offense against the neutrality laws of the United States to transport persons intending to enlist in a foreign military service, and arms and munitions of war on the same ship, provided they are

The Itata, 49 Fed. 646; *United States v. The Itata*, 56 Fed. 505, 5 C. C. A. 608 (9th Cir.); *United States v. The Laurada*, 98 Fed. 983, 39 C. C. A. 374 (3d Cir.).

¹¹ *The City of Mexico*, 28 Fed. 148; *United States v. Hart*, 74 Fed. 724.

¹² *United States v. The City of Mexico*, 24 Fed. 33; *United States v. Quincy*, 6 Peters (U. S.), 445, 8 L. ed. 458; *United States v. The City of Mexico*, 28 Fed. 148; *United States v. The Conserva*, 38 Fed. 431, 438; *United States v. The Itata*, 56 Fed. 505, 5 C. C. A. 608 (9th Cir.); *United States v. Hart*, 74 Fed. 724; *United States v. The Laurada*, 89

Fed. 983, 39 C. C. A. 374 (3d Cir.).

¹³ *United States v. The Mary N. Hogan*, 17 Fed. 813, *but see* *United States v. The Three Friends*, 78 Fed. 173.

¹⁴ *United States v. The City of Mexico*, 24 Fed. 33.

¹⁵ *United States v. The Carondelet*, 37 Fed. 799.

¹⁶ *United States v. Trumbull, et al.*, 48 Fed. 94.

¹⁷ *United States v. The Conserva*, 38 Fed. 431; *United States v. The Bello Corrunes*, 6 Wheat. (U. S.) 152, 5 L. ed. 229; *Vujic v. Youngstown Sheet and Tube Company*, 220 Fed. 390.

not a part of any military expedition or enterprise originated in this country.¹⁸ Libel for a prize can only be sustained during a state of war.¹⁹ The courts recognize a distinction between the existence of war in the material sense, and war in a legal sense.²⁰ The enforcement of the neutrality laws of the United States is of necessity under the control of the government and prosecution must be by the government; and an informer's rights are dependent upon the action taken by the government.²¹ No provision has as yet been made to dispose of money held by a court for the benefit of an informer obtained through the forfeiture of a vessel, even though many years have elapsed, and no informer has made a successful claim.²² The information given must lead up to a forfeiture of the vessel to entitle the informer to obtain a moiety.²³

§ 673. Criminal Code. Sec. 12. Augmenting Force of Foreign Vessel of War.

Whoever, within the territory or jurisdiction of the United States, increases or augments, or procures to be increased or augmented, or knowingly is concerned in increasing or augmenting, the force of any ship of war, cruiser, or other armed vessel which, at the time of her arrival within the United States, was a ship of war, or cruiser, or armed vessel, in the service of any foreign prince or state, or of any colony, district, or people, or belonging to the subjects or citizens of any such prince or state, colony, district, or people, the same being at war with any foreign prince or state, or of any colony, district, or people, with whom the United States are at peace, by adding to the number of the guns of such vessel, or by changing those on board of her for guns of a larger caliber, or by adding thereto any equipment solely applicable to war, shall be

¹⁸ *United States v. O'Brien*, 75 Fed. 900, 907; *United States v. Nunez, et al.*, 82 Fed. 599.

¹⁹ *United States v. The City of Mexico*, 28 Fed. 148; *United States v. Weed*, 5 Wall. (U.S.) 62, 18 L. ed. 531; *United States v. The Watchful*, 6 Wall. (U.S.) 91, 18 L. ed. 763.

²⁰ *United States v. The Three*

Friends, 166 U. S. 1, 41 L. ed. 897, 17 S. C. 495.

²¹ *Oliver v. Hyland*, 186 Fed. 843, 108 C. C. A. 576 (5th Cir.); *United States v. The Venus*, 180 Fed. 635.

²² *United States v. The Resolute*, 40 Fed. 543.

²³ *United States v. The City of Mexico*, 32 Fed. 105.

fined not more than one thousand dollars and imprisoned not more than one year.¹

Making ordinary repairs to the equipment of a vessel without adding to or augmenting the armament or any part thereof is not a violation of this section.² The statute must be construed strictly and substantial evidence must be introduced to secure a conviction. Under this note will be found a case where the evidence was examined and held not to justify a conviction under this statute.³

§ 674. Criminal Code. Sec. 13. Military Expeditions against People at Peace with the United States.

Whoever, within the territory or jurisdiction of the United States, or of any of its possessions knowingly begins, or sets on foot, or provides or prepares a means for, or furnishes the money for, or who takes part in, any military or naval expedition or enterprise, to be carried on from thence against the territory or dominion of any foreign prince or state, or of any colony, district, or people, with whom the United States is at peace, shall be fined not more than three thousand dollars or imprisoned not more than three years, or both.¹

Particular things aimed to be done by the conspiracy must be clearly stated in the indictment.² Jurisdiction of the court may be determined by the place of the formation of the conspiracy as well as that of the commission of the overt act. It is not necessary for the complaint to state the name of the city where the supplies were shipped and stored.³ It is sufficient under this section to charge in the indictment that the defendants, by

§ 673. ¹ Formerly R. S. Sec. 5285, 35 Stat. L. 1090.

² *Moodie v. The Betty Cathcart*, Bee, 292, 3 Dall. (U. S.) 288, Fed. Cas. No. 9742; *Moodie v. The Brothers*, Bee, 76, Fed. Cas. No. 9743; *Moodie v. The Phoebe Anne*, 3 Dall. (U. S.) 319, 1 L. ed. 618, 4 Ops. Atty.-Gen. 336; *British Consul v. The Nancy*, Fed. Cas. No. 1898.

³ *United States v. Trumbull*, 48 Fed. 99.

§ 674. ¹ Formerly Section 5286, as amended by Act of June 15, 1917, 40 St. 223. See also CONSPIRACY, Chapter LXI, *post*.

² *United States v. Bopp*, 230 Fed. 723; *United States v. Hess*, 124 U. S. 483, 486, 31 L. ed. 516, 8 S. C. 571.

³ *De Orozco v. United States*, 237 Fed. 1008, 1013, 151 C. C. A. 70 (5th Cir.).

an act the character of which is of a warlike nature, inaugurated and set on foot an enterprise for the furtherance of a military or warlike purpose against a kingdom or country with which the United States are at peace.⁴ This section creates two offenses: (1) Setting on foot within the United States a military expedition against a power with whom the United States is at peace. (2) Providing the means for such an expedition, *i.e.* the means of transportation.⁵ A single individual may violate this section by providing means for such a military expedition.⁶ Engaging in the transportation of arms and munitions of war is lawful but the transportation of a military enterprise is unlawful.⁷ Preparations for importing large quantities of arms and munitions of war to a colony of a belligerent nation for the purpose of instigating revolt even though the preparations of the defendants anticipated a journey to another land by the defendants are criminal.⁸ Prior recognition of legitimacy or belligerency of the government or faction against which the expedition is directed, by this government, is not necessary to make the provisions of this section applicable.⁹ A military expedition or enterprise does not necessarily mean an organized body of troops, but where there is a preconcerted plan of operations, with leadership, and a coördination of men and arms and munitions for the purpose of crippling or destroying military institutions of a belligerent nation, there is a military enterprise or expedition as contemplated by the statute.¹⁰ Where a number of men organize themselves

⁴ United States *v.* Chakraberty, 244 Fed. 287.

⁵ United States *v.* Hart, 78 Fed. 868; United States *v.* Chakraberty, *supra*.

⁶ United States *v.* Ram Chandra, 254 Fed. 635.

⁷ United States *v.* Murphy, 84 Fed. 609; United States *v.* Pena, 69 Fed. 983.

⁸ United States *v.* Chakraberty, 244 Fed. 287; *Contra*: United States *v.* Pena, et al., 69 Fed. 983; United States *v.* Murphy, 84 Fed. 609; United States *v.* O'Brien, 75 Fed. 900; United States *v.* Hart, 78 Fed. 868.

⁹ United States *v.* The Three Friends, 166 U. S. 1, 41 L. ed. 897, 17 S. C. 495; De Orozco *v.* United States, 237 Fed. 1008, 151 C. C. A. 70 (5th Cir.).

¹⁰ United States *v.* Chakraberty, et al., 244 Fed. 287; United States *v.* Murphy, 84 Fed. 609, 614; United States *v.* O'Sullivan, Fed. Cas. No. 15975; United States *v.* Ybáñez, 53 Fed. 536; Wiborg *v.* United States, 163 U. S. 632, 41 L. ed. 289, 16 S. C. 1127, 1197; United States *v.* Tauscher, 233 Fed. 597; *but see*, United States *v.* Pena, 69 Fed. 983; United States *v.* Hart, 74 Fed. 724.

into a body within the limits of the United States, with the common intent to proceed as a body to a foreign territory to engage in armed hostilities with a power with which the United States is at peace, all elements of a military enterprise are present as soon as they take their first step to proceed to the scene of hostility.¹¹ It is lawful for men without organization to leave this country as individuals with the purpose of enlisting with a body of insurgents to fight against a foreign government. It is of no moment that the same vessel carries munitions with which to provide them. It therefore follows that it is not a crime knowingly to carry persons intending to enlist in a foreign service and munitions of war on the same ship, provided they are not part of a military expedition originated in this country.¹² The employment of men to go from the United States to Canada to destroy the Welland Canal there situated, which was used by Great Britain, a friendly power of the United States, for military purposes, is a military enterprise and in violation of this section.¹³ The sending of a single spy to Great Britain with whom the United States was at peace for the purpose of eliciting military information for Germany constitutes a "military enterprise" as distinguished from a "military expedition" and is in violation of this section.¹⁴ It is not necessary that the men be drilled or put in uniform while in the United States in order to convict for this offense.¹⁵ Providing the means of transportation with knowledge that it is to be used as a military enterprise against a power with which we are at peace is criminal and within this section.¹⁶ The mere organization of a military expedition or enterprise within the limits of the United States against a country with which the United States is at peace is a crime.¹⁷

¹¹ *United States v. Murphy*, 84 Fed. 609.

¹² *United States v. O'Brien*, 75 Fed. 900; *United States v. Hart*, 78 Fed. 868.

¹³ *United States v. Tauscher*, 233 Fed. 597.

¹⁴ *United States v. Sander*, 241 Fed. 417.

¹⁵ *United States v. Ybanez*, 53 Fed. 536.

¹⁶ *United States v. Murphy*, 84 Fed. 609; *Hart v. United States*, 84 Fed. 799, 28 C. C. A. 612 (3d Cir.).

¹⁷ *United States v. Ybanez*, 53 Fed. 536; *United States v. Pena*, 69 Fed. 983.

§ 675. Criminal Code. Sec. 14. Enforcement of Foregoing Provisions.

The district courts shall take cognizance of all complaints, by whomsoever instituted, in cases of captures made within the waters of the United States, or within a marine league of the coasts or shores thereof. In every case in which a vessel is fitted out and armed, or attempted to be fitted out and armed, or in which the force of any vessel of war, cruiser, or other armed vessel is increased or augmented, or in which any military expedition or enterprise is begun or set on foot, contrary to the provisions and prohibitions of this chapter; and in every case of the capture of a vessel within the jurisdiction or protection of the United States as before defined; and in every case in which any process issuing out of any court of the United States is disobeyed or resisted by any person having the custody of any vessel of war, cruiser, or other armed vessel of any foreign prince or state, or of any colony, district, or people, or of any subjects or citizens of any foreign prince or state, or of any colony, district, or people, it shall be lawful for the President, or such other person as he shall have empowered for that purpose, to employ such part of the land or naval forces of the United States, or of the militia thereof, for the purpose of taking possession of and detaining any such vessel, with her prizes, if any, in order to enforce the execution of the prohibitions and penalties of this chapter, and the restoring of such prizes in the cases in which restoration shall be adjudged; and also for the purpose of preventing the carrying on of any such expedition or enterprise from the territory or jurisdiction of the United States against the territory or dominion of any foreign prince or states, or of any colony, district, or people with whom the United States are at peace.¹

To justify a seizure under this section, the complaint must specifically aver that the naval or military forces of the United States were employed for that purpose, and that the seizure belonged to the force so employed.² Where a prisoner was arrested

§ 675. ¹ Formerly R. S. Sec. 5287,
35 St. L. 1090.

² *Gelston v. Hoyt*, 3 Wheat. (U. S.) 246, 4 L. ed. 381.

by the military authorities on an order from the War Department and detained without due process of law on suspicion that he had violated the neutrality laws of the United States, the court held that when the country is at peace with all nations, there is nothing to disturb the civil courts in the orderly discharge of their appropriate duties and ordered the release of the prisoner.³

§ 676. Criminal Code. Sec. 15. Compelling Foreign Vessels to Depart.

It shall be lawful for the President to employ such part of the land or naval forces of the United States, or of the militia thereof, as he may deem necessary to compel any foreign vessel to depart from the United States or any of its possessions in all cases in which, by the law of nations or the treaties of the United States, it ought not to remain, and to detain or prevent any foreign vessel from so departing in all cases in which, by the law of nations or the treaties of the United States, it is not entitled to depart.¹

The only purpose of this section and of Section 16 is to provide for the enforcement of the Neutrality Laws of the United States.²

§ 677. Criminal Code. Sec. 16. Armed Vessels to Give Bond on Clearance.

The owners or consignees of every armed vessel sailing out of the ports of, or under the jurisdiction of, the United States, belonging wholly or in part to citizens thereof, shall, before clearing out the same, give bond to the United States, with sufficient sureties, in double the amount of the value of the vessel and cargo on board, including her armament, conditioned that the vessel shall not be employed by such owners to cruise or commit hostilities against the subjects, citizens, or property of any foreign prince or state, or of any colony, district, or people, with whom the United States are at peace.¹

³ *Ex parte Orozco*, 201 Fed. 106; *but see Ex parte Toscano*, 208 Fed. 938, 943, *contra*.

§ 676. ¹ Formerly R. S. Sec. 5288, amended by the Act of June 15, 1917, 40 St. L. 223.

² *Wiborg v. United States*, 163 U. S. 632, 41 L. ed. 289, 16 S. C. 1127, 1197.

§ 677. ¹ Formerly R. S. Sec. 5289, 35 Stat. L. 1091.

A vessel seized in violation of the neutrality laws may or may not be released on bond in the discretion of the court.² Should just grounds of suspicion exist, the judge may require a bond to observe the neutrality laws.³

§ 678. Criminal Code. Sec. 17. Detention by Collectors of Customs.

The several collectors of the customs shall detain any vessel manifestly built for warlike purposes, and about to depart the United States, or any place subject to the jurisdiction thereof, the cargo of which principally consists of arms and munitions of war, when the number of men shipped on board, or other circumstances, render it probable that such vessel is intended to be employed by the owners to cruise or commit hostilities upon the subjects, citizens, or property of any foreign prince or state, or of any colony, district, or people with whom the United States are at peace, until the decision of the President is had thereon, or until the owner gives such bond and security as is required of the owners of armed vessels by the preceding section.¹

The collector of customs cannot justify his refusing clearance to a vessel and her cargo merely because he acted under instructions from the Secretary of the Treasury unless such instructions were authorized by law.² The collectors are not authorized to detain vessels, although manifestly built for warlike purposes and about to depart from the United States unless circumstances shall render it probable that such vessels are intended to be employed by the owners to commit hostilities against some foreign power at peace with the United States.³ The allegation that it is the purpose of a vessel to transport munitions of war for the use of an insurrectionary party to a country with which the United States are at peace is not sufficient to justify the collector of customs to refuse clearance to the vessel. He must aver facts

² *United States v. The Mary N. Hogan*, 17 Fed. 813; *United States v. The Three Friends*, 166 U. S. 1, 41 L. ed. 897, 17 S. C. 495.

³ *United States v. Quitman*, Fed. Cas. No. 16111.

§ 678. ¹ Formerly R. S. Sec. 5290, 35 Stat. L. 1091.

² *Hendricks v. Gonzalez*, 67 Fed. 351, 14 C. C. A. 659 (2d Cir.).

³ *United States v. Quincy*, 6 Peters (U. S.), 445, 8 L. ed. 458.

from which the inference may be drawn that the men on board were to be used for hostile purposes or other circumstances rendering it probable that she was intended to be employed "to cruise or commit hostilities." The fact that the vessel is a merchant steamship raises the presumption that the vessel was not "manifestly built for warlike purposes", which is another necessary averment according to the wording of this section.⁴ "I know of no law or regulation which forbids any person or government, whether the political designation be real or assumed, from purchasing arms from the citizens of the United States and shipping them at the risk of the purchaser."⁵

§ 679. Criminal Code. Sec. 18. Construction of This Chapter.

The provisions of this chapter shall not be construed to extend to any subject or citizen of any foreign prince, state, colony, district, or people who is transiently within the United States and enlists or enters himself on board of any vessel of war, letter of marque, or privateer, which at the time of its arrival within the United States was fitted and equipped as such, or hires or retains another subject or citizen of the same foreign prince, state, colony, district, or people who is transiently within the United States to enlist or enter himself to serve such foreign prince, state, colony, district, or people on board such vessel of war, letter of marque, or privateer, if the United States shall then be at peace with such foreign prince, state, colony, district, or people. Nor shall they be construed to prevent the prosecution or punishment of treason, or of any piracy defined by the laws of the United States.¹

⁴ *Hendricks v. Gonzalez*, 67 Fed. 351, 14 C. C. A. 659 (2d Cir.).

⁵ Purchase of arms from neutrals, 11 Ops. Atty.-Gen. 451, 452.

§ 679. ¹ Formerly R. S. Sec. 5291, 35 Stat. L. 1091. See specially, *Wiborg v. United States*, 163 U. S. 632, 41 L. ed. 289, 16 S. C. 1127, 1197.

CHAPTER XLVIII

CRIMINAL CODE, CHAPTER THREE

OFFENSES AGAINST THE ELECTIVE FRANCHISE AND CIVIL RIGHTS OF CITIZENS

- § 680. Crim. Code § 19. Conspiracy to Injure, etc., Persons in the Exercise of Civil Rights.
- § 681. Crim. Code § 20. Depriving Citizens of Civil Rights under Color of State Laws.
- § 682. Crim. Code § 21. Conspiring to Prevent Officer from Performing Duties.
- § 683. Crim. Code § 22. Unlawful Presence of Troops at Elections.
- § 684. Crim. Code § 23. Intimidation of Voters by Officers, etc., of Army or Navy.
- § 685. Crim. Code § 24. Officers of Army or Navy Prescribing Qualifications of Voters.
- § 686. Crim. Code § 25. Officers, etc., of Army or Navy Interfering with Officers of Election, etc.
- § 687. Crim. Code § 26. Persons Disqualified from Holding Office; When Soldiers, etc., May Vote.

§ 680. Criminal Code. Sec. 19. Conspiracy to Injure, etc., Persons in the Exercise of Civil Rights.

If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same, or if two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured, they shall be fined not more than five thousand dollars and imprisoned not more than ten years, and shall, moreover,

be thereafter ineligible to any office, or place of honor, profit, or trust created by the Constitution or laws of the United States.¹

While this section was enacted to put an end to the doings of the "Ku-Klux" and the like, which operated against the southern negroes; nevertheless it deals with all Federal rights of all citizens and protects them all.

The right to vote at a Federal election is a right secured by the constitutional laws of the United States and comes under Section 19 of the Criminal Code. The constitutionality of this section has been upheld.² Under this statute, the indictment need not state definitely the names of the persons injured.³ Every person born in the United States is a citizen thereof.⁴ The offense under this statute must be directly charged and cannot be made out by inference or implication.⁵ This section aims to guard definite personal rights, such as the right to vote for Federal candidates, but not the political privilege common to all that the public be protected against harmful acts, which includes the general interest of candidate and voter in the fair and honest conduct of such elections. Therefore, a conspiracy to bribe voters, at

§ 680. ¹ Formerly R. S. Sec. 5508, 35 Stat. L. 1092. See also CONSPIRACY, Chapter LXI, *post*.

² United States *v.* Mosley, 238 U. S. 383, 59 L. ed. 1355, 35 S. C. 904; Guinn *v.* United States, 238 U. S. 347, 59 L. ed. 1340, 35 S. C. 926; James *v.* Bowman, 190 U. S. 127, 47 L. ed. 979, 23 S. C. 678; Swafford *v.* Templeton, 185 U. S. 487, 46 L. ed. 1005, 22 S. C. 783; Wiley *v.* Sinkler, 179 U. S. 58, 45 L. ed. 84, 21 S. C. 17; Re Quarles, 158 U. S. 532, 535, 39 L. ed. 1080, 15 S. C. 959; Re Coy, 127 U. S. 731, 32 L. ed. 274, 8 S. C. 1263; Logan *v.* United States, 144 U. S. 263, 36 L. ed. 429, 12 S. C. 617; Baldwin *v.* Franks, 120 U. S. 678, 30 L. ed. 766, 7 S. C. 656, 763; Ex parte Yarbrough, 110 U. S. 651, 28 L. ed. 274, 4 S. C. 452; United States *v.* O'Toole, 236 Fed. 993;

Guinn *v.* United States, 228 Fed. 103, 142 C. C. A. 509 (8th Cir.); United States *v.* Aczel, 219 Fed. 917, affirmed in 232 Fed. 652, 146 C. C. A. 578 (7th Cir.); United States *v.* Stone, et al., 188 Fed. 836; Felix *v.* United States, 186 Fed. 685, 108 C. C. A. 503 (5th Cir.).

³ Williamson *v.* United States, 207 U. S. 425, 449, 52 L. ed. 278, 28 S. C. 163; United States *v.* Stone, 188 Fed. 836; s. c. United States *v.* Stone, 197 Fed. 483.

⁴ McKenzie *v.* Hare, 239 U. S. 299.

⁵ McKenna *v.* United States, 127 Fed. 88, 62 C. C. A. 88 (6th Cir.); Pettibone *v.* United States, 148 U. S. 197, 37 L. ed. 419, 13 S. C. 542; United States *v.* Cruikshank, 92 U. S. 542, 23 L. ed. 588; United States *v.* Britton, 108 U. S. 199, 27 L. ed. 698, 2 S. C. 531.

an election where Presidential electors, a United States Senator, and a Representative in Congress were to be chosen, was held not in violation of this section.⁶ The right of a qualified elector to vote at an election for members of Congress is secured to him by the Constitution of the United States; a conspiracy to deprive an elector of this right is in violation of this section.⁷ The right to perfect a homestead entry under a Federal law is held to be a right or privilege within this section.⁸ The right to aid in the execution of Federal laws by giving information to the proper authorities of the violation of the law is a right or privilege within this section.⁹ Resisting Federal marshals or deputy marshals in the exercise of their duty comes within the meaning of the statute.¹⁰ A citizen in the custody of a United States Marshal under a lawful commitment to answer for an offense against the United States is entitled to protection under this section.¹¹ Deputy internal revenue collectors are entitled to the protection of this section.¹² Intimidating a person from prosecuting contempt proceedings for the violation of a decree of a Federal Court is punishable under this section.¹³ A conspiracy by two or more persons to prevent negro citizens from leasing lands and cultivating them because they are negroes is indictable within the meaning of the statute.¹⁴ Any person falsely accusing a citizen of the United States for the purpose of having that person convicted and put to labor, or of enabling some other person to hire him, is indictable under this section.¹⁵ This section does not protect the rights of an elector in primary elections for United States

⁶ *United States v. Bathgate, et al.*, 246 U. S. 220, 62 L. ed. 676, 38 S. C. 269.

⁷ *Aczel v. United States*, 232 Fed. 652, 146 C. C. A. 578 (7th Cir.).

⁸ *United States v. Waddell*, 112 U. S. 76, 28 L. ed. 673, 5 S. C. 35; *Edwards v. United States*, 223 Fed. 309, 138 C. C. A. 551 (9th Cir.).

⁹ *In re Quarles*, 158 U. S. 532, 39 L. ed. 1080, 15 S. C. 959; *Motes v. United States*, 178 U. S. 458, 44 L. ed. 1150, 20 S. C. 993.

¹⁰ *Davis v. United States*, 107 Fed. 753, 46 C. C. A. 619 (6th Cir.);

United States v. Patrick, 54 Fed. 338.

¹¹ *Logan v. United States*, 144 U. S. 263, 36 L. ed. 429, 12 S. C. 617; *United States v. Logan*, 45 Fed. 872.

¹² *United States v. Patrick*, 54 Fed. 338.

¹³ *United States v. Lancaster*, 44 Fed. 885.

¹⁴ *United States v. Morris, et al.*, 125 Fed. 322, 331.

¹⁵ *Peonage Cases*, 123 Fed. 671, 682, 683; *Smith, et al. v. United States*, 157 Fed. 721, 85 C. C. A. 353 (8th Cir.).

Senators etc. It applies to general elections.¹⁶ This does not apply to persons not citizens exercising a right given them by treaty.¹⁷ This section is interpreted to affect only Federal elections. State and municipal elections are under State jurisdiction and consequently do not come within the meaning of the section.¹⁸ A candidate has no rights cognizable in a Federal Court in an indorsement given by a political party under the laws of a State.¹⁹ Intimidating and forcing negroes to forfeit rights under a contract of employment is not punishable under this section, but the remedy is under the State statutes.²⁰ This section cannot be extended so as to make it a means of enforcing a State primary law.²¹ The right of any person to be a witness and to attend court for the purpose of giving testimony is not a right granted by the Constitution and any wrong committed against him while exercising such rights is not punishable under this section.²² Interference with a person's rights to due process of law while under the custody of the authorities of a State for the violation of its laws does not come within the meaning of the statute.²³ It was not in violation of this section to conspire to deport from Arizona citizens of the United States some of whom had registered under the "Selective Service Regulations" since that Act does not require registrants to remain at their legal residences.²⁴ A threat made in order to influence the vote of a person awaiting sentence "that sentence will be pronounced", is too vague to equal coercion.²⁵ A threat by the defendant to

¹⁶ *United States v. O'Toole*, 236 Fed. 993.

¹⁷ *Baldwin v. Franks*, 120 U. S. 678, 30 L. ed. 766, 7 S. C. 656, 763.

¹⁸ *Karem v. United States*, 121 Fed. 250, 57 C. C. A. 486 (6th Cir.).

¹⁹ *United States v. O'Toole*, 236 Fed. 993, *affirmed* in 243 U. S. 476, 61 L. ed. 857, 37 S. C. 407.

²⁰ *Hodges v. United States*, 203 U. S. 1, 51 L. ed. 65, 27 S. C. 6, *followed* in *United States v. Powell*, 212 U. S. 564, 53 L. ed. 653, 29 S. C. 690.

²¹ *United States v. Gradwell*, 243 U. S. 476, 61 L. ed. 857, 37 S. C. 407;

United States v. Waddell, 112 U. S. 76, 79, 28 L. ed. 673, 5 S. C. 35; *United States v. Moore*, 129 Fed. 630; *United States v. Eberhart, et al.*, 127 Fed. 254.

²² *United States v. Sanges*, 48 Fed. 78.

²³ *Ex parte Riggins*, 134 Fed. 404, *reversed* in *United States v. Powell*, 151 Fed. 648, *affirmed* in 212 U. S. 564, 53 L. ed. 653, 29 S. C. 690, on authority of *Hodges v. United States*, 203 U. S. 1, 51 L. ed. 65, 27 S. C. 6.

²⁴ *United States v. Wheeler, et al.*, 254 Fed. 611.

²⁵ *United States v. Welch*, 243 Fed. 996.

withdraw his trade from a voter unless he exercises the suffrage in favor of a certain ticket is not a violation of this section unless the plaintiff can prove that the threat in the particular case is equal to coercion.²⁶ Threats must be sufficient in severity or apprehension to influence the mind of a person of ordinary firmness.²⁷ Intent is the essential and material element.²⁸ The indictment must set forth the acts constituting the conspiracy.²⁹ "Conspiracy" has an established meaning in our courts.³⁰ There is, however, a distinction between Federal rights enjoyed by citizens of the United States as such. One class of rights relates to protection on the part of the United States against an unconstitutional act of the State and the other has reference to the protection of same against unlawful action on the part of individuals. The cases in the next note fully illustrate the distinction just noted.³¹

§ 681. Criminal Code. Sec. 20. Depriving Citizens of Civil Rights under Color of State Laws.

Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects, or causes to be subjected, any inhabitant of any State, Territory, or

²⁶ *United States v. Wilcox*, 243 Fed. 993.

²⁷ *United States v. Huckabee*, 16 Wall. (U. S.) 414, 432, 21 L. ed. 457; *United States v. Wilcox*, 243 Fed. 993; *United States v. Welch, et al.*, 243 Fed. 996.

²⁸ *Buchanan v. United States*, 233 Fed. 257, 147 C. C. A. 263 (8th Cir.); *United States v. Waddell*, 112 U. S. 76, 80, 28 L. ed. 673, 5 S. C. 35; *Guinn v. United States*, 228 Fed. 103, 142 C. C. A. 509 (8th Cir.).

²⁹ *Haynes v. United States*, 10 Fed. 817, 42 C. C. A. 34 (8th Cir.).

³⁰ *Davis v. United States*, 107 Fed. 753, 46 C. C. A. 619 (6th Cir.); *United States v. Johnson*, 26 Fed. 682; *Wright v. United States*, 108 Fed. 805, 48 C. C. A. 37 (5th Cir.). See also Chapter LXI, CONSPIRACY.

³¹ *United States v. Cruikshank*, 92 U. S. 542, 23 L. ed. 588; *Virginia v. Rives*, 100 U. S. 313, 318, 25 L. ed. 667; *United States v. Harris*, 106 U. S. 629, 27 L. ed. 290, 1 S. C. 601; *Civil Rights Cases*, 109 U. S. 3, 11, 13, 27 L. ed. 835, 3 S. C. 18; *Ex parte Virginia*, 100 U. S. 339, 25 L. ed. 676; *James v. Bowman*, 190 U. S. 127, 47 L. ed. 979, 23 S. C. 678; *Barney v. City of New York*, 193 U. S. 430, 48 L. ed. 737, 24 S. C. 502; *Hodges v. United States*, 203 U. S. 1, 51 L. ed. 65, 27 S. C. 6; *Logan v. United States*, 144 U. S. 263, 36 L. ed. 429, 12 S. C. 617; *In re Quarles*, 158 U. S. 532, 39 L. ed. 1080, 15 S. C. 959; *Motes v. United States*, 178 U. S. 458, 44 L. ed. 1150, 20 S. C. 993. And see also *United States v. Gradwell* and *United States v. Bathgate, supra*.

District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than one thousand dollars, or imprisoned not more than one year, or both.¹

An offense charged under this statute must be committed under color of a law, ordinance, regulation, or custom.² Enforcing a State law making it an offense to hire Chinese labor comes within the meaning of this statute.³ Where the supervisors of an election under color of a State statute arrange ballots in a negro district to make it difficult for illiterate negroes to vote, the indictment need not allege that the statute on its face discriminates against negro voters.⁴ Negro citizens must bring their action for civil wrongs in the State Court.⁵ This statute is penal and is not sufficient to support a civil suit.⁶

§ 682. Criminal Code. Sec. 21. Conspiring to Prevent Officer from Performing Duties.

If two or more persons in any State, Territory, or District conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, Territory, District, or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties,

¹ **§ 681.** Formerly, R. S. Sec. 5510 35 Stat. L. 1092.

² *United States v. Buntin*, 10 Fed. 730.

³ *Re Tiburcio Parrott*, 1 Fed. 481.

⁴ *United States v. Stone, et al.*, 188 Fed. 836.

⁵ *Civil Rights Cases*, 109 U. S. 3, 27 L. ed. 835, 3 S. C. 18; *Hodges v. United States*, 203 U. S. 1, 51 L. ed. 65, 27 S. C. 6.

⁶ *Browner v. Irvin*, 169 Fed. 964. And see, also, note 31 of § 680, *supra*.

each of such persons shall be fined not more than five thousand dollars, or imprisoned not more than six years, or both.¹

Our courts have given a definite meaning to conspiracy.² "A conspiracy to deprive a lawyer of his right to practice law in a State Court is not a conspiracy to interfere with any right or privilege granted, secured, or protected by the Constitution or laws of the United States."³ Congress probably had in mind simple threats whether communicated or not.⁴

§ 683. Criminal Code. Sec. 22. Unlawful Presence of Troops at Elections.

Every officer of the Army or Navy, or other person in the civil, military, or naval service of the United States, who orders, brings, keeps, or has under his authority or control any troops or armed men at any place where a general or special election is held in any State, unless such force be necessary to repel armed enemies of the United States, shall be fined not more than five thousand dollars and imprisoned not more than five years.¹

§ 684. Criminal Code. Sec. 23. Intimidation of Voters by Officers, etc., of Army or Navy.

Every officer or other person in the military or naval service of the United States who, by force, threat, intimidation, order, advice, or otherwise, prevents, or attempts to prevent, any qualified voter of any State from freely exercising the right of suffrage at any general or special election in such State shall be fined not more than five thousand dollars and imprisoned not more than five years.¹

§ 682. ¹ Formerly R. S. Sec. 5518, 35 Stat. L. 1092. *See also* CONSPIRACY, Chapter LXI, *post*.

² *Wright v. United States*, 108 Fed. 805, 48 C. C. A. 37 (5th Cir.); *United States v. Johnson*, 26 Fed. 682.

³ *Per Caldwell, C. J., in Green v.*

Elbert, 63 Fed. 308, 11 C. C. A. 207 (8th Cir.).

⁴ *United States v. Metzendorf*, 252 Fed. 933, 937.

§ 683. ¹ Formerly R. S. Sec. 5228, 35 Stat. L. 1092.

§ 684. ¹ Formerly R. S. Sec. 5529, 35 Stat. L. 1092.

§ 685. Criminal Code. Sec. 24. Officers of Army or Navy Prescribing Qualifications of Voters.

Every officer of the army or navy who prescribes or fixes, or attempts to prescribe or fix, whether by proclamation, order, or otherwise, the qualifications of voters at any election in any State shall be punished as provided in the preceding section.¹

§ 686. Criminal Code. Sec. 25. Officers, etc., of Army or Navy Interfering with Officers of Election, etc.

Every officer or other person in the military or naval service of the United States who, by force, threat, intimidation, order, or otherwise, compels, or attempts to compel, any officer holding an election in any State to receive a vote from a person not legally qualified to vote, or who imposes, or attempts to impose, any regulations for conducting any general or special election in a State different from those prescribed by law, or who interferes in any manner with any officer of an election in the discharge of his duty, shall be punished as provided in section twenty-three.¹

§ 687. Criminal Code. Sec. 26. Persons Disqualified from Holding Office; When Soldiers, etc., May Vote.

Every person convicted of any offense defined in the four preceding sections shall, in addition to the punishment therein prescribed, be disqualified from holding any office of honor, profit, or trust under the United States; but nothing therein shall be construed to prevent any officer, soldier, sailor, or marine from exercising the right of suffrage in any election district to which he may belong, if otherwise qualified according to the laws of the State in which he offers to vote.¹

§ 685. ¹ Formerly R. S. Sec. 5530,
35 Stat. L. 1092.

§ 686. ¹ Formerly R. S. Sec. 5531,
35 Stat. L. 1092.

§ 687. ¹ Formerly R. S. Sec. 5532.
35 Stat. L. 1093.

CHAPTER XLIX

CRIMINAL CODE, CHAPTER FOUR

OFFENSES AGAINST THE OPERATIONS OF THE GOVERNMENT

- § 688. Crim. Code § 27. Forgery of Letters Patent.
- § 689. Crim. Code § 28. Forging Bids, Public Records, etc.
- § 690. Crim. Code § 29. Forging Deeds, Powers of Attorney, etc.
- § 691. Crim. Code § 30. Having Forged Papers in Possession.
- § 692. Crim. Code § 31. False Acknowledgments.
- § 693. Crim. Code § 32. Falsely Pretending to be United States Officer.
- § 694. Crim. Code § 33. False Personation of Holder of Public Stock.
- § 695. Crim. Code § 34. False Demand on Fraudulent Power of Attorney.
- § 696. Crim. Code § 35. Making or Presenting False Claims.
- § 697. Crim. Code § 36. Embezzling Arms, Stores, etc.
- § 698. Crim. Code § 37. Conspiracy to Commit Offense against the United States; All Parties Liable for Acts of One. *See* CHAPTER LXI. "CONSPIRACY."
- § 699. Crim. Code § 38. Delaying or Defrauding Captor or Claimant, etc., of Prize Property.
- § 700. Crim. Code § 39. Bribery of United States Officer.
- § 701. Crim. Code § 40. Unlawfully Taking or Using Papers Relating to Claims.
- § 702. Crim. Code § 41. Persons Interested Not to Act as Agents of the Government.
- § 703. Crim. Code § 42. Enticing Desertions from the Military or Naval Service.
- § 704. Crim. Code § 43. Enticing Away Workmen.
- § 705. Crim. Code § 44. Injuries to Fortifications, Harbor Defenses, etc.
- § 706. Crim. Code § 45. Unlawfully Entering upon Military Reservation, Fort, etc.
- § 707. Crim. Code § 46. Robbery or Larceny of Personal Property of the United States.
- § 708. Crim. Code § 47. Embezzling, Stealing, etc., Public Property.
- § 709. Crim. Code § 48. Receivers, etc., of Stolen Public Property.
- § 710. Crim. Code § 49. Timber Depredations on Public Lands.
- § 711. Crim. Code § 50. Timber, etc., Depredations on Indian and Other Reservations.

- § 712. Crim. Code § 51. Boxing, etc., Timber on Public Lands for Turpentine, etc.
- § 713. Crim. Code § 52. Setting Fire to Timber on Public Lands.
- § 714. Crim. Code § 53. Failing to Extinguish Fires.
- § 715. Crim. Code § 54. Fines to Be Paid into School Fund.
- § 716. Crim. Code § 55. Trespassing on Bull Run National Forest, Oregon.
- § 717. Crim. Code § 56. Breaking Fence or Gate Inclosing Reserved Lands, or Driving or Permitting Live Stock to Enter Upon.
- § 718. Crim. Code § 57. Injuring or Removing Posts or Monuments.
- § 719. Crim. Code § 58. Interrupting Surveys.
- § 720. Crim. Code § 59. Agreement to Prevent Bids at Sale of Lands.
- § 721. Crim. Code § 60. Injuries to United States Telegraph, etc., Lines.
- § 722. Crim. Code § 61. Counterfeiting Weather Forecast.
- § 723. Crim. Code § 62. Interfering with Employees of Bureau of Animal Industry.
- § 724. Crim. Code § 63. Forgery of Certificate of Entry.
- § 725. Crim. Code § 64. Concealment or Destruction of Invoices, etc.
- § 726. Crim. Code § 65. Resisting Revenue Officer; Rescuing or Destroying Seized Property, etc.
- § 727. Crim. Code § 66. Falsely Assuming to Be a Revenue Officer.
- § 728. Crim. Code § 67. Offering Presents to Revenue Officer.
- § 729. Crim. Code § 68. Admitting Merchandise to Entry for Less than Legal Duty.
- § 730. Crim. Code § 69. Securing Entry of Merchandise by False Samples, etc.
- § 731. Crim. Code § 70. False Certification by Consular Officer.
- § 732. Crim. Code § 71. Taking Seized Property from Custody of Revenue Officer.
- § 733. Crim. Code § 72. Forging or Altering Ship's Papers or Custom-House Documents.
- § 734. Crim. Code § 73. Forging Military Bounty-land Warrant, etc.
- § 735. Crim. Code § 74. Forging, etc., Certificate of Citizenship.
- § 736. Crim. Code § 75. Engraving, etc., Plate for Printing or Photographing, Selling or Bringing into United States, etc., Certificate of Citizenship.
- § 737. Crim. Code § 76. False Personation, etc., in Procuring Naturalization.
- § 738. Crim. Code § 77. Using False Certificate of Citizenship, or Denying Citizenship, etc.
- § 739. Crim. Code § 78. Using False Certificate, etc., as Evidence of Right to Vote, etc.
- § 740. Crim. Code § 79. Falsely Claiming Citizenship.
- § 741. Crim. Code § 80. Taking False Oath in Naturalization Proceedings.
- § 742. Crim. Code § 81. Provisions Applicable to All Courts of Naturalization.

- § 743. Crim. Code § 82. Shanghaiing and Falsely Inducing Person Intoxicated to Go on Vessel Prohibited.
- § 744. Crim. Code § 83. Corporations, etc., Not to Contribute Money for Political Elections, etc.
- § 745. Crim. Code § 84. Hunting Birds, or Taking Their Eggs from Breeding Grounds, Prohibited.

§ 688. Criminal Code. Sec. 27. Forgery of Letters Patent.

Whoever shall falsely make, forge, counterfeit, or alter any letters patent granted or purporting to have been granted by the President of the United States; or whoever shall pass, utter, or publish, or attempt to pass, utter, or publish as genuine, any such forged, counterfeited, or falsely altered letters patent, knowing the same to be forged, counterfeited, or falsely altered, shall be fined not more than five thousand dollars and imprisoned not more than ten years.¹

§ 689. Criminal Code. Sec. 28. Forging Bids, Public Records, etc.

Whoever shall falsely make, alter, forge, or counterfeit, or cause or procure to be falsely made, altered, forged, or counterfeited, or willingly aid, or assist in the false making, altering, forging, or counterfeiting, any bond, bid, proposal, contract, guarantee, security, official bond, public record, affidavit, or other writing for the purpose of defrauding the United States; or shall utter or publish as true, or cause to be uttered or published as true, or have in his possession with the intent to utter or publish as true, any such false, forged, altered, or counterfeited bond, bid, proposal, contract, guarantee, security, official bond, public record, affidavit, or other writing, for the purpose of defrauding the United States, knowing the same to be false, forged, altered, or counterfeited; or shall transmit to, or present at, or cause or procure to be transmitted to, or presented at, the office of any officer of the United States, any such false, forged, altered, or counterfeited bond, bid, proposal, contract, guarantee, security, official bond, public record, affidavit, or other writing, knowing the same to be false, forged, altered, or counterfeited,

§ 688. ¹ Formerly R. S. Sec. 5416, 35 Stat. L. 1093.

for the purpose of defrauding the United States, shall be fined not more than one thousand dollars, or imprisoned not more than ten years, or both.¹

The indictment is fatally defective if it fails to charge that the forged affidavit was made for the purpose of defrauding the United States.² Where the forged affidavit was filed to support a swamp-land claim and this affidavit was unnecessary and was not the important factor in determining the claim, an indictment will not lie.³ It was formerly held that the statute is aimed at forgery, and that the false making of a document was not within the section;⁴ but by a recent ruling of the United States Supreme Court, this statute was held to cover the making of every kind of false document whether it be forged or dishonest.⁵ This section is intended to cover the offense of publishing as true any false, forged, or counterfeited writing intended to defraud the United States.⁶ This statute does not include false entries made in a bank's books, or promissory notes made by a national bank official for the purpose of defrauding the United States bank examiner.⁷ Counterfeiting a blank form of certificate of residence of a Chinaman issued by the Government is not within this section.⁸ In a prosecution under this section for causing perjured affidavits it is no defense that the proceedings before the Land Office were commenced after the statutory period elapsed. If the instrument or affidavit is apparently valid on its face, it is sufficient upon which to base a conviction although collateral or extrinsic facts may exist that would render it void if genuine.⁹ If the court can say that the forged instruments on their face have the capacity to effect the fraud, a demurrer will be overruled. If they are calculated to deceive and are

§ 689. ¹ Formerly R. S. Sec. 5418, 5479, 35 Stat. L. 1094.

² *United States v. Van Leuven*, 62 Fed. 69.

³ *United States v. Barnhart*, 33 Fed. 459, re-argued at p. 464.

⁴ *United States v. Wentworth*, 11 Fed. 52, 55; *United States v. Hartman*, 65 Fed. 490, 491.

⁵ *United States v. Davis*, 231 U. S. 183, 58 L. ed. 177, 34 S. C. 112,

citing *United States v. Staats*, 8 How. 41, 12 L. ed. 979.

⁶ *United States v. Albert*, 45 Fed. 552, 557.

⁷ *Cross v. North Carolina*, 132 U. S. 131, 138, 33 L. ed. 287, 290, 10 S. C. 47.

⁸ *United States v. Ah Won*, 97 Fed. 494.

⁹ *Neff v. United States*, 165 Fed. 273, 278, 91 C. C. A. 241 (8th Cir.).

intended to be used for a fraudulent purpose, that is sufficient.¹⁰ It is not essential to charge or prove an actual financial or property loss to make a case under this statute.¹¹ A person who impersonates another before a board of civil service examiners, for the purpose of securing a place on the eligible list for such person, is guilty of a violation of this statute.¹² Where the forged affidavit was made before a notary, who had no specific authority to witness the affidavit, the conviction will be set aside.¹³ Where a postmaster who had made up proper quarterly reports went before a justice of the peace with them, and then obtained permission from the latter to affix his name to the jurat and affixed such name, the conviction was reversed.¹⁴ It is well settled that to be the subject of forgery a writing must possess some apparent legal efficacy; otherwise it would have no tendency to defraud. It must be one, which, if genuine, would injure another.¹⁵ The offense is statutory, but it is akin to the uttering of forged instruments. Established rules of law applicable to cases of this nature are that, where the instrument or affidavit is so palpably and absolutely invalid that it cannot under any circumstances inflict loss or injury, the charge of the offense cannot be sustained, but if under any contingency the forged instrument may be prejudicial, it is sufficient to form the basis of a conviction.¹⁶

¹⁰ *United States v. McKinley*, 127 Fed. 166.

¹¹ *United States v. Plyler*, 222 U. S. 15, 56 L. ed. 70, 32 S. C. 6, *citing* *Haas v. Henkel*, 216 U. S. 462, 480, 54 L. ed. 569, 577, 30 S. C. Rep. 249, 17 A. & E. Ann. Cases, 112; *Curley v. United States*, 130 Fed. 1, 64 C. C. A. 369 (1st Cir.); *United States v. Bunting*, 82 Fed. 883.

¹² *Curley v. United States*, 130 Fed. 1, 64 C. C. A. 369 (1st Cir.).

¹³ *United States v. Hall*, 131 U. S. 50, 33 L. ed. 97, 9 S. C. 663.

¹⁴ *Staton v. United States*, 88 Fed. 253, 31 C. C. A. 521 (8th Cir.).

¹⁵ *Burden v. State*, 120 Ala. 388; *People v. Tomlinson*, 35 Cal. 503; *King v. State*, 43 Fla. 211; *State v. Van Auken*, 98 Iowa, 674; *State*

v. Woods, 104 Ind. 444; *Colson v. Commonwealth*, 110 Ky. 233; *State v. Anderson*, 30 La. Ann. 557; *Commonwealth v. Hinds*, 101 Mass. 209; *Cox v. State*, 66 Miss. 14; *People v. Drayton*, 168 N. Y. 10; *State v. Evans*, 15 Mont. 539; *Barnum v. State*, 15 Ohio, 717; *State v. Corley*, 4 Baxt. (Tenn.) 410; *State v. Smith*, 8 Yerg. (Tenn.) 150; *Howell v. State*, 37 Tex. 591; *People v. Collins*, 9 Cal. App. 622; *Commonwealth v. Cochran*, 143 Ky. 807; *Reg. v. Turberville*, 4 Cox (C. C.) 13; *Reg. v. Rouse*, 4 Cox (C. C.) 7; *State v. Briggs*, 34 Vt. 501; 2 *Wharton Criminal Law*, 901.

¹⁶ *Neff v. United States*, 165 Fed. 273, — C. C. A. — (— Cir.).

An indictment for forging a certificate purporting to be signed by a mustering officer of the United States, and certifying that a certain person named had been mustered into the military service of the United States and credited in Allen County, and that the said soldier was entitled to a bounty which had been voted by the county board, was held to be bad because, at the time of the alleged forgery, the appropriation of money for bounties was illegal and void, and no extrinsic facts were averred showing the fraudulent tendency of the certificate. The court said that "it is hard to see how a void thing could have a market value."¹⁷ Consequently an instrument void on its face cannot usually be the subject of forgery.¹⁸ A written instrument, to be the subject of indictment for forgery, must be valid if genuine, for the purpose intended. If void, or invalid on its face, and it cannot be made good by averment, the crime of forgery cannot be predicated upon it.¹⁹ Certificate of acknowledgment alleged to be forged did not set forth that the grantor acknowledged the execution of the conveyance, therefore defective in form under New York statute. Held no forgery. Affidavits as to swamp lands alleged in an indictment under Section 5418 to have been forged could not have been legally used to defraud the United States, because they were *functus officio*, and the title to the land was wholly unaffected by them, therefore a demurrer to the indictment was sustained.²⁰ On a trial for passing a forged receipt it was disclosed that the receipt upon its face showed that it was given before the merging of the indebtedness, for which it purported to be given into a note and afterwards into a judgment, and that it could not possibly offset the judgment or the note, and that therefore it could not affect the property rights of the parties.

¹⁷ Reed v. State, 28 Ind. 396.

¹⁸ Beinbert v. State, 53 Ala. 467; People v. Heed, 1 Idaho, 531; Brown v. People, 86 Ill. 239; State v. Pierce, 8 Iowa, 231; Abbott v. Ross, 62 Me. 194; State v. Leonard, 171 Mo. 622; People v. Galloway, 17 Wend. 540; People v. Shall, 9 Cow. (N. Y.) 778; Henderson v. State, 14 Tex. 503; Forcy v. State, 60 Tex. 206; State v. McManus, 129 Wis. 659; Fomby v.

State, 87 Ala. 36; Downing v. Brown, 3 Colo. 571; State v. Dorrance, 86 Iowa, 428; Commonwealth v. Dallagher, 118 Mass. 386; Commonwealth v. Dunleay, 157 Mass. 386; Roode v. State, 5 Neb. 174; Henry v. State, 35 Ohio St. 128; Jolin v. State, 23 Wis. 504.

¹⁹ People v. Harrison, 8 Barb. 560.

²⁰ United States v. Barnhart, 33 Fed. 459.

It was held that it could not be a subject for forgery.²¹ It will not be presumed, in aid of indictment for forging a time pass on a railroad that the official designated therein as general manager was, in fact, such general manager.²² A false report of a public school purporting to be signed by one who had neither been elected by the trustees nor appointed nor contracted with by the superintendent as a teacher of the school, could be no basis for issuance of a certificate for payment of salary, and was not the subject of forgery.²³ An order for the delivery of goods was accepted and paid, and returned to the drawer, and the date of it subsequently altered by him. The alteration was held not forgery at common law, although manifestly done with a fraudulent intent. To constitute forgery in such case, the act must have a tendency to effectuate the intended fraud. An order satisfied by the delivery of the goods, in the hands of the drawer, in legal acceptance is no instrument, and an alteration of its date is no false making; it is what it purports to be.²⁴ In *People v. Cady*,²⁵ the court followed the *Fitch* case²⁶ in the following circumstances: After notice of executing a writ of inquiry was served upon an attorney, he altered the figures indicating the day appointed for executing the writ, so as to make the notice apparently irregular, and with intent to defraud. It was held not a forgery either at common law or under the New York Statute. A customer of a bank, having a paid check of his sent back to him by the bankers, altered the style of handwriting so as to make it appear not his and then returned it, declaring it to have been a forgery, and got credit from them for that amount. It was held that this was no forgery by the customer.²⁷

§ 690. Criminal Code. Sec. 29. Forging Deeds, Powers of Attorney, etc.

Whoever shall falsely make, alter, forge, or counterfeit, or cause or procure to be falsely made, altered, forged,

²¹ *Knezek v. State*, 47 Tex. Cr. 157.

²² *Goodman v. People*, 228 Ill.

154.

²³ *Moore v. State*, 107 Miss. 181; *Griffin v. State*, 96 Miss. 309. See also *State v. Floyd*, 81 N. E. 1153 (Ind.)

²⁴ *People v. Fitch*, 1 Wend. (N. Y.) 198.

²⁵ 6 Hill (N. Y.) 490.

²⁶ *People v. Fitch*, 1 Wend. (N. Y.) 198.

²⁷ *Brittain v. Bank of London*, 3 F. & F. 465.

or counterfeited, or willingly aid or assist in the false making, altering, forging, or counterfeiting, any deed, power of attorney, order, certificate, receipt, contract, or other writing, for the purpose of obtaining or receiving, or of enabling any other person, either directly or indirectly, to obtain or receive from the United States, or any of their officers or agents, any sum of money; or whoever shall utter or publish as true, or cause to be uttered or published as true, any such false, forged, altered, or counterfeited deed, power of attorney, order, certificate, receipt, contract, or other writing, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited; or whoever shall transmit to, or present at, or cause or procure to be transmitted to, or presented at, any office or officer of the Government of the United States, any deed, power of attorney, order, certificate, receipt, contract, or other writing, in support of, or in relation to, any account or claim, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited, shall be fined not more than one thousand dollars and imprisoned not more than ten years.¹

The indictment must aver that the false certificate or writing was transmitted in support of a pending claim against the United States and what that claim was.² It is proper to charge in the same indictment the making of the false affidavit as well as the offering or transmitting of same.³ An indictment under this section which describes the act and also charges a crime under a statute lessening the degree of the crime is valid. If the evidence should not be sufficient to sustain a conviction under the first statute it might prove sufficient under the other or less severe statute.⁴ Notwithstanding the specific act, Section 4746 of the Revised Statutes, covering pension frauds, an indictment under this section is proper where a copy of the fraudulent affidavit is a part of such indictment and it appears therefrom that the accused

§ 690. ¹ Formerly R. S. Sec. 5421, 35 Stat. L. 1094.

² *United States v. Kessel*, 62 Fed. 59.

³ *Crain v. United States*, 162 U. S. 625, 40 L. ed. 1097, 16 S. C. 952.

⁴ *United States v. Hansee*, 79 Fed. 303.

signed such affidavit and was not the suborner in the case.⁵ This section includes false as well as forged affidavits.⁶ It applies to instruments altered or forged for the purpose of obtaining moneys from the United States or their officers or agents.⁷ Forging is defined as the false making of a paper and does not necessarily mean the entire fabrication of the paper but has reference to any addition or alteration on a genuine paper. Tracing a name with a pencil and filling it in with ink is such an act.⁸ Where the accused obtained a genuine government draft and forged an endorsement thereon, he may properly be indicted under this section.⁹ Aiding and assisting another in the false making of a writing or certificate for the purpose of fraudulently obtaining a pension is punishable under this section.¹⁰ Where the notary falsely states in his certificate that the affiant appeared before him, an indictment under this section is improper and a demurrer to the indictment will be sustained.¹¹ The indictment charged the defendant with forging the signature of the witnessing notary with the purpose of defrauding the United States. It appeared, however, that the report to which it was signed was true in fact. The court held that the indictment was not framed under this section, there being no averment that the act was for the purpose of obtaining or receiving money from the United States.¹² The intent of this section is to prevent the making or using of a forged writing in asserting a claim against the United States. Hence, where the defendant was receiving a fixed pension from the Government and his wife filed a claim that he had deserted her and she was entitled to half of that pension, and the husband in resisting such claim, submitted a false affidavit he cannot be indicted under this section.¹³ Under this section, it is a crime to intend to use a forged document in securing admission to the Military Academy

⁵ *United States v. Kuentsler*, 74 Fed. 220.

⁶ *United States v. Davis*, 231 U. S. 183, 58 L. ed. 177, 34 S. C. 112.

⁷ *United States v. Reese*, 4 Sawy. 629, 27 Fed. Cas. No. 16138.

⁸ *United States v. Osgood*, 27 Fed. Cas. No. 15971 a.

⁹ *De Lemos v. United States*, 91 Fed. 497, 33 C. C. A. 655 (5th Cir.).

¹⁰ *United States v. Hartman*, 65 Fed. 490.

¹¹ *United States v. Moore*, 60 Fed. 738; *United States v. Glasener*, 81 Fed. 566.

¹² *Staton v. United States*, 88 Fed. 253, 31 C. C. A. 521 (8th Cir.).

¹³ *United States v. Swan*, 131 Fed. 140.

at West Point.¹⁴ A preliminary sworn statement or application for the purchase of land under the Timber and Stone Act does not constitute the presentation of a writing in support of or in relation to a claim against the United States. The reason being that there is no existing account or claim.¹⁵ The defendant procured a third person to execute false papers to support a homestead claim. He then sent these affidavits to a vendee who paid a consideration for them. The Court held that this evidence was insufficient to justify a conviction under this statute. Until these papers were actually filed with the Land Office there was no certainty that they were to be used to defraud the United States.¹⁶

§ 691. Criminal Code. Sec. 30. Having Forged Papers in Possession.

Whoever, knowingly and with intent to defraud the United States, shall have in his possession any false, altered, forged, or counterfeited deed, power of attorney, order, certificate, receipt, contract, or other writing, for the purpose of enabling another to obtain from the United States, or from any officer or agent thereof, any sum of money, shall be fined not more than five hundred dollars, or imprisoned not more than five years, or both.¹

§ 692. Criminal Code. Sec. 31. False Acknowledgments.

Whoever, being an officer authorized to administer oaths or to take and certify acknowledgments, shall knowingly make any false acknowledgment, certificate, or statement concerning the appearance before him or the taking of an oath or affirmation by any person with respect to any proposal, contract, bond, undertaking, or other matter, submitted to, made with, or taken on behalf of, the United States, and concerning which an oath or affirmation is required by law or regulation made in pursuance of law, or with respect to the financial standing of any principal, surety, or other party to any such proposal, contract, bond, undertaking, or other instrument,

¹⁴ *McGinniss v. United States*, 256 Fed. 621, — C. C. A. — (2d Cir.).

¹⁶ *United States v. Fout*, 123 Fed. 625.

¹⁵ *United States v. Byron*, 223 Fed. 798, *citing* Judge Shiras in *United States v. Kessel*, 62 Fed. 59, 60.

§ 691. ¹ Formerly R. S. Sec. 5422, 35 Stat. L. 1094.

shall be fined not more than two thousand dollars, or imprisoned not more than two years, or both.¹

§ 693. Criminal Code. Sec. 32. Falsely Pretending to Be United States Officer.

Whoever, with intent to defraud either the United States or any person, shall falsely assume or pretend to be an officer or employee acting under the authority of the United States, or any Department, or any officer of the Government thereof, and shall take upon himself to act as such, or shall in such pretended character demand or obtain from any person or from the United States, or any Department, or any officer of the Government thereof, any money, paper, document, or other valuable thing, shall be fined not more than one thousand dollars, or imprisoned not more than three years, or both.¹

The nature of the fraud intended need not be stated in the indictment. The impersonation is what is made a crime.² The purpose of this section is to "prohibit and punish the falsely assuming or pretending with intent to defraud and . . . to be an officer or employee of the United States as defined in the clause. . . ."³ A person impersonating a member of the House of Representatives of the United States for the purpose of defrauding certain individuals may be prosecuted under this section.⁴ The defendant pretended to be an agent employed by the Government for the purpose of selling a certain set of books entitled, "Messages and Papers of Presidents." The fact that the agent or official of the Government sought to be impersonated did not in fact exist, does not make the indictment demurrable.⁵ Impersonating an inspector of the Department of Agriculture

§ 692. ¹ 35 Stat. L. 1094.

§ 693. ¹ Formerly R. S. Sec. 5438, 35 Stat. L. 1095.

² *Lamar v. United States*, 240 U. S. 60, 60 L. ed. 526, 36 S. C. 255; *Brafford v. United States*, 259 Fed. 511, — C. C. A. — (6th Cir.); *Roberts v. United States*, 248 Fed. 873, C. C. A. (9th Cir.).

³ *Lamar v. United States*, 241 U.

S. 103, 60 L. ed. 912, 36 S. C. 535; *Littell v. United States*, 169 Fed. 620, 95 C. C. A. 148 (9th Cir.).

⁴ *Lamar v. United States*, 241 U. S. 103, 60 L. ed. 912, 36 S. C. 535.

⁵ *United States v. Barnow*, 239 U. S. 74, 60 L. ed. 155, 36 S. C. 19, reversing 221 Fed. 140. See, however, *United States v. Rush*, 196 Fed. 579.

is an offense under this section.⁶ "Where the assumption or pretense is false in part, but contains a modicum of truth, the statute is violated." The Court asks: "Why should it be deemed less an offense where the assumption or pretense is entirely false, as where the very office or employment to which the accused pretends title has no legal or actual existence?"⁷ Accordingly it was recently held that city detectives who were on duty to arrest naval "stragglers" were guilty of a violation of this section when at the time of making an arrest they falsely represented themselves to be naval officers.⁸

§ 694. Criminal Code. Sec. 33. False Personation of Holder of Public Stock.

Whoever shall falsely personate any true and lawful holder of any share or sum in the public stocks or debt of the United States, or any person entitled to any annuity, dividend, pension, prize money, wages, or other debt due from the United States, and, under color of such false personation, shall transfer or endeavor to transfer such public stock or any part thereof, or shall receive or endeavor to receive the money of such true and lawful holder thereof, or the money of any person really entitled to receive such annuity, dividend, pension, prize money, wages, or other debt, shall be fined not more than five thousand dollars and imprisoned not more than ten years.¹

§ 695. Criminal Code. Sec. 34. False Demand on Fraudulent Power of Attorney.

Whoever shall knowingly or fraudulently demand or endeavor to obtain any share or sum in the public stocks of the United States, or to have any part thereof transferred, assigned, sold, or conveyed, or to have any annuity, dividend, pension, prize money, wages, or other debt due from the United States, or any part thereof, received, or paid by virtue of any false, forged, or counterfeited power

⁶ *Brafford v. United States*, 259 Fed. 511, — C. C. A. — (6th Cir.).

⁸ *Reed v. United States*, 252 Fed. 221, C. C. A. (2d Cir.).

⁷ *United States v. Barnow*, 239 U. S. 74, 77, 60 L. ed. 155, 156, 36 S. C. 19.

§ 694. ¹ Formerly R. S. Sec. 5435, 35 Stat. L. 1095.

of attorney, authority, or instrument, shall be fined not more than five thousand dollars and imprisoned not more than ten years.¹

§ 696. Criminal Code. Sec. 35. Making or Presenting False Claims.

Whoever shall make or cause to be made or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military or naval service of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, any claim upon or against the Government of the United States, or any department or officer thereof, or any corporation in which the United States of America is a stockholder, knowing such claim to be false, fictitious, or fraudulent; or whoever, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, or for the purpose and with the intent of cheating and swindling or defrauding the Government of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, shall knowingly and willfully falsify or conceal or cover up by any trick, scheme or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit or deposition knowing the same to contain any fraudulent or fictitious statement or entry; or whoever shall take and carry away or take for his own use, or for the use of another, with intent to steal or purloin, any personal property of the United States, or any branch or department thereof, or any corporation in which the United States of America is a stockholder; or whoever shall enter into any agreement, combination or conspiracy to defraud the Government of the United States, or any department or officer thereof, or any corporation in which the United States of America is a stockholder, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim; and whoever, having charge, possession, custody

§ 695. ¹ Formerly R. S. Sec. 5436, 35 Stat. L. 1095.

or control of any money or other public property used or to be used in the military or naval service, with intent to defraud the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, or willfully to conceal such money or other property, shall deliver or cause to be delivered to any person having authority to receive the same any amount of such money or other property less than that for which he received a certificate or took a receipt; or whoever, being authorized to make or deliver any certificate, voucher, receipt, or other paper certifying the receipt of arms, ammunition, provisions, clothing or other property so used or to be used, shall make or deliver the same to any other person without a full knowledge of the truth of the facts stated therein and with intent to defraud the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, shall be fined not more than \$10,000 or imprisoned not more than ten years, or both. And whoever shall purchase, or receive in pledge, from any person any arms, equipment, ammunition, clothing, military stores, or other property furnished by the United States, under a clothing allowance or otherwise, to any soldier, sailor, officer, cadet or midshipman in the military or naval service of the United States or of the National Guard or Naval Militia, or to any person accompanying, serving or retained with the land or naval forces and subject to military or naval law, having knowledge or reason to believe that the property has been taken from the possession of the United States or furnished by the United States under such allowance, shall be fined not more than \$500 or imprisoned not more than two years, or both.¹

This section has been held to be constitutional.² An indictment which charges the defendant, a deputy marshal, with presenting a false claim for mileage, etc., to the marshal of the district for payment but omits to state the name of any person or office to whom it was to be presented is fatally defective; the

§ 696. ¹ Formerly R. S. Sec. 5438, 35 Stat. L. 1095, as amended by Act of October 23, 1918, 40 Stat. L. 1015.

² *Ontai v. United States*, 188 Fed. 310, 110 C. C. A. 288 (9th Cir.).

marshal could not pay the claim on behalf of the government as it was technically his own claim against the government.³ The conspiracy is the gist of the offense, without reference to whether the crime or fraud which the conspirators have conspired to commit was consummated, or was agreed upon by the conspirators in all its details.⁴ The defendant, a deputy marshal of the United States, presented a false claim for approval. The claim was submitted first to one George Turner, then late marshal, and to the District Judge in open court. It was held that the indictment was good and that the District Judge was, for this purpose, a person employed in the civil service of the United States. It was further held that for the purpose of settling his accounts and serving processes in his possession the late marshal was still an officer of the United States.⁵ In an indictment under this section, the means or details constituting the fraudulent scheme to induce payment must be stated.⁶ A notary public is authorized to administer the oath necessary to a claim for additional homestead allowed to soldiers of the rebellion. Hence, where such claim is fraudulently made and the oath is taken before a notary public, an indictment alleging such facts is proper.⁷ Charging in an indictment the making and presenting of a false claim is proper and is not bad for duplicity. To further allege in the indictment that the person to whom the bill was presented had authority to approve the claim is sufficient.⁸ An indictment under this section charging both the making and presenting of a false claim against the United States is not bad for duplicity, as both these acts are parts of the offense described.⁹ The wife of the defendant, called to testify against him and being informed of her rights, gave testimony which would strengthen the defense. The court held that the testimony was properly admitted and that the rule prohibiting a wife from being a witness against her

³ *United States v. Wallace*, 40 Fed. 144.

⁴ *United States v. Downey*, 257 Fed. 364.

⁵ *United States v. Strobach*, 48 Fed. 902.

⁶ *United States v. Greene*, 115 Fed. 343.

⁷ *United States v. Lair*, 118 Fed. 98.

⁸ *United States v. Franklin*, 174 Fed. 161; *Eisenberg v. United States*, 261 Fed. 598, — C. C. A. — (5th Cir.).

⁹ *United States v. Franklin*, 174 Fed. 161; *Bridgeman v. United States*, 140 Fed. 577, 72 C. C. A. 145 (9th Cir.).

husband was not violated.¹⁰ This section covers the making of a false pension claim.¹¹ Presenting a false voucher concerning a pension to the government official authorized to make payment of pensions is a crime within the meaning of this section.¹² Presenting a false claim to the Treasurer for medical and burial expenses of a pensioner of the United States is within the meaning of this section.¹³ The transmission of a false and fraudulent voucher of disbursements by an Indian Agent to the Commissioner of Indian Affairs, for which disbursements he claims credit in his quarterly report, constitutes the presenting of a false claim against the United States.¹⁴ A mere conspiracy to defraud the United States without some act in furtherance of it is not a crime.¹⁵ The word "affidavit" as used in this section relates to the form of the false paper and not to its legal character.¹⁶ Presenting a claim knowing that the same has previously been paid by the United States, is within the prohibition of this section.¹⁷ If the claim is made in good faith no conviction could be had.¹⁸ Blankets and khaki shirts issued to a recruit in the United States Marine Corps are public property and cannot be sold by him. To sustain the conviction the following need be proved: that the purchase was knowingly made; that what was bought was military equipment and that the vendor was a soldier or sailor employed in the military service.¹⁹ Receiving an olive drab overcoat from a soldier as a pledge for a loan is prohibited.²⁰ Under the extradition treaty between the United States and Great Britain, a person may

¹⁰ *United States v. Jones*, 32 Fed. 569. For the Trial Court's Charge to Jury, see 32 Fed. 482.

¹¹ *Edgington v. United States*, 164 U. S. 361, 41 L. ed. 467, 17 S. C. 72.

¹² *Pooler v. United States*, 127 Fed. 509, 62 C. C. A. 307 (1st Cir.).

¹³ *Ingraham v. United States*, 155 U. S. 434, 39 L. ed. 213, 15 S. C. 148.

¹⁴ *Bridgeman v. United States*, 140 Fed. 577, 72 C. C. A. 145 (9th Cir.).

¹⁵ *United States v. Reichert*, 32 Fed. 142.

¹⁶ *United States v. Ingraham*, 49 Fed. 155.

¹⁷ *Dimmick v. United States*, 116 Fed. 825, 54 C. C. A. 329 (9th Cir.).

¹⁸ *United States v. Route*, 33 Fed. 246.

¹⁹ *Lobosco v. United States*, 183 Fed. 742, 106 C. C. A. 476 (2d Cir.). See also *United States v. Smith*, 156 Fed. 859; *United States v. Michael*, 153 Fed. 609; *Ontai v. United States*, 188 Fed. 310, 110 C. C. A. 288 (9th Cir.).

²⁰ *United States v. Koplik*, 155 Fed. 919. See also *United States v. Hart*, 146 Fed. 202; *Bolland v. United States*, 238 Fed. 529, 151 C. C. A. 465 (4th Cir.).

be extradited from Canada who is charged with entering into a conspiracy with an army officer to defraud the government out of large sums of money belonging to the government then in the officer's possession.²¹ This section as amended in 1918 applies to civilians as well as to persons in the military or naval service.²²

§ 697. Criminal Code. Sec. 36. Embezzling Arms, Stores, etc.

Whoever shall steal, embezzle, or knowingly apply to his own use, or unlawfully sell, convey, or dispose of, any ordnance, arms, ammunition, clothing, subsistence, stores, money, or other property of the United States, furnished or to be used for the military or naval service, shall be punished as prescribed in the preceding section.¹

The indictment must aver with particularity the property alleged to be embezzled, and the averment of the embezzlement of a certain amount in dollars and cents is insufficient as a general rule in the absence of statute.² Military homes are not military establishments and inmates of such homes are not in the military service. Therefore, the appropriation of an overcoat issued to an inmate of a military home is not in violation of this section.³ A person who through fraudulent enlistment receives transportation and subsistence and uses them for the purpose intended cannot be indicted under this section.⁴

§ 698. Criminal Code. Sec. 37. Conspiracy to Commit Offense against the United States; All Parties Liable for Acts of One.

See Chapter LXI, devoted specially to the subject of conspiracy.

§ 699. Criminal Code. Sec. 38. Delaying or Defrauding Captor or Claimant, etc., of Prize Property.

Whoever shall willfully do, or aid or advise in the doing, of any act relating to the bringing in, custody, preservation, sale, or other disposition of any property captured as

²¹ *Greene v. United States*, 154 Fed. 401, 85 C. C. A. 251 (5th Cir.).

²² *United States v. Barry*, 260 Fed. 291.

§ 697. ¹ Formerly R. S. Sec. 5439, 35 Stat. L. 1096.

² *Moore v. United States*, 160 U. S. 268, 40 L. ed. 422, 16 S. C. 294.

³ *United States v. Murphy*, 9 Fed. 26.

⁴ *United States v. Buchanan*, 238 Fed. 877.

prize or relating to any documents or papers connected with the property, or to any deposition or other document or paper connected with the proceedings, with intent to defraud, delay, or injure the United States or any captor or claimant of such property, shall be fined not more than ten thousand dollars, or imprisoned not more than five years, or both.¹

§ 700. Criminal Code. Sec. 39. Bribery of United States Officer.

Whoever shall promise, offer, or give, or cause or procure to be promised, offered, or given, any money or other thing of value, or shall make or tender any contract, undertaking, obligation, gratuity, or security for the payment of money, or for the delivery or conveyance of anything of value, to any officer of the United States, or to any person acting for or on behalf of the United States in any official function, under or by authority of any department or office of the Government thereof, or to any officer or person acting for or on behalf of either House of Congress, or of any committee of either House, or both Houses thereof, with intent to influence his decision or action on any question, matter, cause, or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, or with intent to influence him to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States, or to induce him to do or omit to do any act in violation of his lawful duty, shall be fined not more than three times the amount of money or value of the thing so offered, promised, given, made, or tendered, or caused or procured to be so offered, promised, given, made, or tendered, and imprisoned not more than three years.¹

This section refers to "bribery of United States officers."² An immigration inspector is an "officer" within the meaning

§ 699. ¹ Formerly R. S. Sec. 5441, 35 Stat. L. 1096.

§ 700. ¹ Formerly R. S. Sec. 5451, 35 Stat. L. 1096.

² *United States v. Green*, 136 Fed. 618; *United States v. Bordonaro*, 253 Fed. 477; for a case where the evidence was held to be insufficient, *see*

of the statute.³ A secret service operative is an "officer" within the meaning of the statute.⁴ Offering to bribe a Chinese interpreter appointed by the Secretary of the Treasury to interpret letters favorable to the defendant, is not a crime under this section. When the interpreter serves as an interpreter of the Chinese language at a hearing before a United States Commissioner, he is not acting within the scope of his official duty.⁵ Offering a bribe to induce an internal revenue officer to set fire to a distillery to which he had access is not punishable under this section. The bribe must be to influence his official action or judgment.⁶ An offer to a postmaster to induce him to sell postage stamps on credit in violation of the Act of June 17, 1878, chapter 259, § 1, is punishable under this section.⁷ Giving and accepting bribes to influence the report of agents of the Commissioner of Indian Affairs regarding an application for leniency made by a criminal are prohibited by this section.⁸ "Lawful duty" as used here means not only duty imposed by law or statute, but duty lawfully imposed in any way.⁹ "Every action that is within the range of official duty comes within the purview of these sections." To constitute official action it is not necessary that it should be prescribed by statute, it is sufficient if it is governed by a lawful requirement of some government Department under whose authority the officer sought to be bribed is acting. Nor is it necessary that the requirement should be prescribed by a written rule or regulation.¹⁰ This section was held to include a baggage porter who was employed in the baggage room of a railroad operated by the United States.¹¹ Where the offense is begun by the mailing

Kirkwood v. United States, 256 Fed. 825, C. C. A. (8th Cir.). The gravamen of the charge is the acceptance of or the soliciting of the bribe. *Sharp v. United States*, 138 Fed. 878, 71 C. C. A. 258 (8th Cir.).

³ *Becharias v. United States*, 208 Fed. 143, 125 C. C. A. 359 (7th Cir.).

⁴ *United States v. Ingham*, 97 Fed. 935.

⁵ *In re Yee Gee*, 83 Fed. 145.

⁶ *United States v. Gibson*, 47 Fed.

833; *United States v. Boyer*, 85 Fed. 425.

⁷ *In re Palliser*, 136 U. S. 257, 34 L. ed. 514, 10 S. C. 1034.

⁸ *United States v. Birdsall*, 233 U. S. 223, 58 L. ed. 930, 34 S. C. 512.

⁹ *Haas v. Henkel*, 166 Fed. 621, 627; *also United States v. Haas*, 163 Fed. 908, 910.

¹⁰ *United States v. Birdsall*, 233 U. S. 223, 58 L. ed. 930, 34 S. C. 512.

¹¹ *United States v. Krichman*, 256 Fed. 974.

of a letter in one District and completed by the receipt in another District, the defendant may be punished in either District.¹² Circumstantial evidence examined and held insufficient to sustain a conviction.¹³ Whether the language used by one of the defendants amounted to an offer to bribe an official of a draft board is a question for the jury.¹⁴ The post office department contracted with a certain time recording company to purchase some of their clocks. The sale was effected through the efforts of the defendant. The latter was friendly with one Beavers, whose judgment on matters of this kind was of importance with his superiors who made the contract on behalf of the department. After the defendant received his commissions for the sale, he would withdraw a certain sum from his bank, and a few days later the account of Beavers would swell up proportionately. The evidence examined, and under all the conditions in the case, *held*, that the evidence was insufficient to establish the crime.¹⁵ It would seem that a mere tender of a check is not within the bribery statute.¹⁶ War Department Inspectors supervising the manufacture of army supplies are officials within this section.¹⁷

§ 701. Criminal Code. Sec. 40. Unlawfully Taking or Using Papers Relating to Claims.

Whoever shall take and carry away, without authority from the United States, from the place where it has been filed, lodged, or deposited, or where it may for the time being actually be kept by authority of the United States, any certificate, affidavit, deposition, written statement of facts, power of attorney, receipt, voucher, assignment, or other document, record, file, or paper, prepared, fitted, or intended to be used or presented in order to procure the payment of money from or by the United States, or any officer or agent thereof, or the allowance or payment of the whole or any part of any claim, account, or demand

¹² *In re Palliser*, 136 U. S. 257, 34 L. ed. 514, 10 S. C. 1034; *Benson v. Henkel*, 198 U. S. 1, 49 L. ed. 919, 25 S. C. 569.

¹³ *Vernon v. United States*, 146 Fed. 121, 76 C. C. A. 547 (8th Cir.).

¹⁴ *August v. United States*, 257 Fed. 388, — C. C. A. — (8th Cir.).

¹⁵ *United States v. Green*, 136 Fed. 618, *affirmed* in 199 U. S. 601, 50 L. ed. 328, 26 S. C. 748.

¹⁶ *United States v. Green*, 136 Fed. 618, *affirmed* in 199 U. S. 601, 50 L. ed. 328, 26 S. C. 748.

¹⁷ *Sears v. United States*, 264 Fed. 257, — C. C. A. — (1st Cir.).

against the United States, whether the same has or has not already been so used or presented, and whether such claim, account, or demand, or any part thereof, has or has not already been allowed or paid; or whoever shall present, use, or attempt to use, any such document, record, file, or paper so taken and carried away, in order to procure the payment of any money from or by the United States, or any officer or agent thereof, or the allowance or payment of the whole or any part of any claim, account, or demand against the United States, shall be fined not more than five thousand dollars, or imprisoned not more than ten years, or both.¹

§ 702. Criminal Code. Sec. 41. Persons Interested Not to Act as Agents of the Government.

No officer or agent of any corporation, joint stock company, or association, and no member or agent of any firm, or person directly or indirectly interested in the pecuniary profits or contracts of such corporation, joint stock company, association, or firm, shall be employed or shall act as an officer or agent of the United States for the transaction of business with such corporation, joint stock company, association, or firm. Whoever shall violate the provision of this section shall be fined not more than two thousand dollars and imprisoned not more than two years.¹

Under this section, the Attorney General of the United States held that a contract to furnish coal to a department of the government can be lawfully awarded to a firm one of whose members is an officer in that department.²

§ 703. Criminal Code. Sec. 42. Enticing Desertions from the Military or Naval Service.

Whoever shall entice or procure, or attempt or endeavor to entice or procure, any soldier in the military service, or any seaman or other person in the naval service of the United States, or who has been recruited for such service, to desert therefrom, or shall aid any such soldier, seaman,

§ 701. ¹ Formerly R. S. Sec. 5454,
35 Stat. L. 1096.

§ 702. ¹ Formerly R. S. Sec. 1783,
35 Stat. L. 1097.

² 24 Opinions Atty.-Gen. 557.

or other person in deserting or in attempting to desert from such service; or whoever shall harbor, conceal, protect, or assist any such soldier, seaman, or other person who may have deserted from such service, knowing him to have deserted therefrom, or shall refuse to give up and deliver such soldier, seaman, or other person on the demand of any officer authorized to receive him, shall be imprisoned not more than three years and fined not more than two thousand dollars.¹

This section applies only to the crime committed by a civilian and has no application to the actual act of desertion which is punishable by a military court-martial.²

§ 704. Criminal Code. Sec. 43. Enticing Away Workmen.

Whoever shall procure or entice any artificer or workman retained or employed in any arsenal or armory, to depart from the same during the continuance of his engagement, or to avoid or break his contract with the United States; or whoever, after due notice of the engagement of such workman or artificer, during the continuance of such engagement, shall retain, hire, or in anywise employ, harbor, or conceal such artificer or workman, shall be fined not more than fifty dollars, or imprisoned not more than three months, or both.¹

§ 705. Criminal Code. Sec. 44. Injuries to Fortifications, Harbor Defenses, etc.

Whoever shall willfully trespass upon, injure, or destroy any of the works or property or material of any submarine mine or torpedo or fortification or harbor-defense system owned or constructed or in process of construction by the United States, or shall willfully interfere with the operation or use of any such submarine mine, torpedo, fortification, or harbor-defense system, or shall knowingly, willfully, or wantonly violate any duly authorized and promulgated order or regulation of the President governing persons

§ 703. ¹ Formerly R. S. Sec. 1553, 5455, 35 Stat. L. 1097.

² Kurtz v. Moffitt, 115 U. S. 487, 29 L. ed. 458, 6 S. C. 148.

§ 704. ¹ Formerly R. S. Sec. 1668, 35 Stat. L. 1097.

or vessels within the limits of defensive sea areas, which defensive sea areas are hereby authorized to be established by order of the President from time to time as may be necessary in his discretion for purposes of national defense, shall be punished on conviction thereof in a district or circuit court of appeals of the United States for the district or circuit in which the offense is committed, or into which the offender is first brought, by a fine of not more than \$5,000 or by imprisonment for a term not exceeding five years, or by both, in the discretion of the court.

Provided, That offenses hereunder committed within the Canal Zone or within any defensive sea areas which the President is authorized to establish by said section, shall be cognizable in the District Court of the Canal Zone, and jurisdiction is hereby conferred upon said court to hear and determine all such cases arising under said section and to impose the penalties therein provided for the violation of any of the provisions of said section.¹

§ 706. Criminal Code. Sec. 45. Unlawfully Entering upon Military Reservation, Fort, etc.

Whoever shall go upon any military reservation, army post, fort, or arsenal, for any purpose prohibited by law or military regulation made in pursuance of law, or whoever shall reënter or be found within any such reservation, post, fort, or arsenal, after having been removed therefrom or ordered not to reënter by any officer or person in command or charge thereof, shall be fined not more than five hundred dollars, or imprisoned not more than six months, or both.¹

§ 707. Criminal Code. Sec. 46. Robbery or Larceny of Personal Property of the United States.

Whoever shall rob another of any kind or description of personal property belonging to the United States, or shall

§ 705. ¹ 39 Stat. L. 1194, as amended March 4, 1917, and May 17, 1917, 40 Stat. L. 89. There were two amendments to this section, one on March 4, 1917, and the other on May

17, 1917; the text includes both amendments as the section should read as amended.

§ 706. ¹ 35 Stat. L. 1097.

feloniously take and carry away the same, shall be fined not more than five thousand dollars, or imprisoned not more than ten years, or both.¹

The statute defines two separate crimes, one that of feloniously and forcibly robbing, and the other that of taking and carrying away property of the United States.² In a *habeas corpus* proceeding the facts were that the petitioner was convicted of the crime of feloniously breaking into and entering a post office and having served his sentence was arrested on a warrant issued by a State tribunal upon an indictment charging him with breaking into the office of a certain individual and stealing, among other things, some postage stamps. The petitioner contended that he was being held under an indictment charging him with the commission of a crime for which he had already been sentenced, but the Court held that the crimes charged were not so similar as to entitle the defendant to a writ of *habeas corpus*.³ The defendant was convicted of the crimes of attempting to break into a post office building, and of breaking into a post office building. He received separate sentences for each of these crimes. After serving the five year sentence for the first crime, he sought his release on a writ of *habeas corpus*. *Held*, that as the attempting to break into and the act of breaking into were one criminal transaction, it was inhuman and unjust that the crime should be split into two separate crimes and the defendant ordered to suffer twice for one crime. The writ was sustained and the prisoner discharged.⁴ This doctrine was later disapproved by the United States Supreme Court.⁵ Where a defendant is found guilty of feloniously breaking into a post office and of stealing postage stamps, and also of stealing a sum of money therein, he may be sentenced separately for each crime.⁶ Postage stamps in the possession of the Government ready to be sold may be the subject

§ 707. ¹ Formerly R. S. Sec. 5456, 35 Stat. L. 1097.

² *Jolly v. United States*, 170 U. S. 402, 42 L. ed. 1085, 18 S. C. 624.

³ *Ex parte Roach*, 166 Fed. 344.

⁴ *Munson v. McClaughry*, 198 Fed. 72, 117 C. C. A. 180 (8th Cir.).

⁵ *Morgan v. Devine*, 237 U. S. 632, 59 L. ed. 1153, 35 S. C. 712; *Ebeling v. Morgan*, 237 U. S. 625, 59 L. ed. 1151, 35 S. C. 710. *See also* *Morgan v. Sylvester*, 231 Fed. 886, 146 C. C. A. 82 (8th Cir.).

⁶ *Anderson v. Moyer*, 193 Fed. 499.

of larceny.⁷ Blank checks and check stubs may be the subject of larceny.⁸

§ 708. Criminal Code. Sec. 47. Embezzling, Stealing, etc., Public Property.

Whoever shall embezzle, steal, or purloin any money, property, record, voucher, or valuable thing whatever, of the moneys, goods, chattels, records, or property of the United States, shall be fined not more than five thousand dollars, or imprisoned not more than five years, or both.¹

An indictment under this section should charge that the property was that of the United States.² The United States has such a property interest in express matter being carried for hire by an express company operated by it under Act of March 21, 1918, which will sustain a prosecution for the larceny of such property under this section.³ The clerk of a Federal District Court is a debtor to the Government of the fees collected and cannot be held for embezzlement thereof.⁴ But a postmaster may be held for embezzlement.⁵ Stealing property from an Indian who is under the guardianship of the United States is not a crime under this section.⁶ Persons convicted for burglarizing a post office in violation of Section 192 of the Federal Penal Code on one count and on another count for stealing certain property of the United States in that post office in violation of Section 47 of the Federal Penal Code may be properly sentenced separately for each crime as it was clearly the intention to make them separate crimes even though both were part of one criminal transaction.⁷

¹ *Jolly v. United States*, 170 U. S. 402, 42 L. ed. 1085, 18 S. C. 624.

² *Keller v. United States*, 168 Fed. 697, 94 C. C. A. 368 (7th Cir.).

§ 708. ¹ 35 Stat. L. 1097.

² *Thompson v. United States*, 256 Fed. 616, — C. C. A. — (2d Cir.). This action is applicable to laborers employed in the Mint. *Schell v. United States*, 261 Fed. 593, C. C. A. (8th Cir.) and paymasters' clerks. *Gurinsky v. United States*, 259 Fed. 378 (C. C. A. 5th Cir.).

³ *United States v. Kambeitz*, 256 Fed. 247.

⁴ *United States v. Mason*, 218 U. S. 517, 54 L. ed. 1133, 31 S. C. 28.

⁵ *McBride v. United States*, 101 Fed. 821, 42 C. C. A. 38 (8th Cir.).

⁶ *Couture v. United States*, 256 Fed. 525, — C. C. A. — (8th Cir.).

⁷ *Morgan v. Sylvester*, 231 Fed. 886, 146 C. C. A. 82 (8th Cir.), and authorities cited.

For the essentials of a valid indictment, see *Moore v. United States*, 160 U. S. 268, 40 L. ed. 422, 16 S. C. 294.

§ 709. Criminal Code. Sec. 48. Receivers, etc., of Stolen Public Property.

Whoever shall receive, conceal, or aid in concealing, or shall have or retain in his possession with intent to convert to his own use or gain, any money, property, record, voucher, or valuable thing whatever, of the moneys, goods, chattels, records, or property of the United States, which has theretofore been embezzled, stolen, or purloined by any other person, knowing the same to have been so embezzled, stolen, or purloined, shall be fined not more than five thousand dollars, or imprisoned not more than five years, or both; and such person may be tried either before or after the conviction of the principal offender.¹

The constitutionality of this section has been upheld.² An indictment under this section which fails to allege that the defendant feloniously stole the property "with the intent to convert same to his own use" is fatally defective.³ But under the Act of February 11, 1913, c. 50, for stealing from a railroad car in interstate commerce such an allegation is unnecessary.⁴ The indictment must contain the allegation that the defendant received or retained the property with the intent to convert to his own use or gain.⁵ The prosecution must prove that the stolen property was in fact stolen from the United States.⁶

§ 710. Criminal Code. Sec. 49. Timber Depredations on Public Lands.

Whoever shall cut or cause or procure to be cut, or shall wantonly destroy, or cause to be wantonly destroyed, any timber growing on the public lands of the United States; or whoever shall remove, or cause to be removed, any timber

¹ § 709. ¹ 35 Stat. L. 1098.

² Kirby v. United States, 174 U. S. 47, 43 L. ed. 890, 19 S. C. 574.

³ Cohn v. United States, 258 Fed. 356 (C. C. A. 2d Cir.).

⁴ Bloch v. United States, 261 Fed. 321 (C. C. A. 5th Cir.).

⁵ Kirby v. United States, 174 U. S. 47, 43 L. ed. 890, 19 S. C. 574; Cohn v. United States, 258 Fed. 355, — C. C. A. — (2d Cir.).

⁶ Naftzger v. United States, 200 Fed. 494, 118 C. C. A. 598 (8th Cir.), citing *Ex parte Bain*, 121 U. S. 1, 30 L. ed. 849, 7 S. C. 781; *State v. Crogan*, 8 Iowa, 523. See also *United States v. DeBare*, 6 Biss. 358, Fed. Cas. No. 14935. The United States is a bailee of personal property while operating a public utility. *Bloch v. United States*, 261 Fed. 321 (C. C. A. 5th Cir.).

from said public lands, with intent to export or to dispose of the same; or whoever, being the owner, master, or consignee of any vessel, or the owner, director, or agent of any railroad, shall knowingly transport any timber so cut or removed from said lands, or lumber manufactured therefrom, shall be fined not more than one thousand dollars, or imprisoned not more than one year, or both. Nothing in this section shall prevent any miner or agriculturist from clearing his land in the ordinary working of his mining claim, or in the preparation of his farm for tillage, or from taking the timber necessary to support his improvements, or the taking of timber for the use of the United States. And nothing in this section shall interfere with or take away any right or privilege under any existing law of the United States to cut or remove timber from any public lands.¹

“Public lands” has been defined by the courts.² Removing timber from non-mineral lands is prohibited.³ A settler on a homestead entry may cut such timber to build a house or for cultivation.⁴

§ 711. Criminal Code. Sec. 50. Timber, etc., Depredations on Indian and Other Reservations.

Whoever shall unlawfully cut, or aid in unlawfully cutting, or shall wantonly injure or destroy, or procure to be wantonly injured or destroyed, any tree, growing, standing, or being upon any land of the United States which, in pursuance of law, has been reserved or purchased by the United States for any public use, or upon any Indian reservation, or lands belonging to or occupied by any tribe of Indians under the authority of the United States, or any Indian allotment while the title to the same shall be held in trust by the Government, or while the same shall remain inalienable by the allottee without the consent of the United States, shall be fined not more than five

§ 710. ¹ 35 Stat. L. 1098.

² *United States v. Blendauer*, 122 Fed. 703, 708; *Newhall v. Sanger*, 92 U. S. 761, 23 L. ed. 769.

³ *English v. United States*, 116 Fed. 625, 54 C. C. A. 81 (9th Cir.).

⁴ *Shiver v. United States*, 159 U. S. 491, 40 L. ed. 231, 16 S. C. 54; *H. D. Williams Cooperage Co. v. United States*, 221 Fed. 234, 137 C. C. A. 90 (8th Cir.).

hundred dollars, or imprisoned not more than one year, or both.¹

The statute does not apply to lands which are subject to pre-emption, homestead, and cash entries. Such lands comprise the general public domain — unappropriated lands, — lands not held back or reserved for any special governmental or public purpose.² A person who enters upon public lands in accordance with the Homestead laws may be convicted for cutting and removing the standing trees and timber found on such land. The title to the land remains in the United States and passes upon issuance of the patent.³ Under the Stockbridge and Munsee Treaty of 1856, the Indians were each to be allotted 80 acre tracts; the allottees were to take immediate possession and the United States was to hold the title in trust until the patent was issued. *Held*, that under this treaty the Indians entering upon said lands, pursuant to this treaty, had the right to cut the timber therefrom and sell it for profit.⁴ One of the defendants cut certain timber from his land which he intended to use in building a house and barn on his allotment of land. The other defendant purchased the timber six months after it was cut down and removed it to his own land to make improvements. *Held*, that while the first defendant was guilty of a violation of this statute, the second defendant had committed no crime.⁵ An indictment under this section charging the commission of the crime on unallotted lands of an Indian Reservation in Wisconsin is valid. The Federal Court has jurisdiction in such a case, even though the State laws may provide an adequate punishment and take cognizance of similar crimes committed within the state.⁶ Grazing cattle on a Forest Reservation without a permit from the Secretary of Agriculture is prohibited.⁷

§ 711. ¹ Formerly R. S. Sec. 5388, 35 Stat. L. 1098, amended, 36 Stat. L. 857.

² *United States v. Payne*, 2 McCrary, 289-306, 8 Fed. Rep. 883; *Turner v. American Baptist Missionary Union*, 5 McLean, 344, Fed. Cas. No. 14251; *United States v. Garretson*, 42 Fed. 22.

³ *Shiver v. United States*, 159 U. S. 491, 40 L. ed. 231, 16 S. C. 54.

⁴ *United States v. Torrey Cedar Company*, 154 Fed. 263.

⁵ *United States v. Konkapot*, 43 Fed. 64.

⁶ *United States v. Kempf*, 171 Fed. 1021.

⁷ *United States v. Bale*, 156 Fed.

§ 712. Criminal Code. Sec. 51. Boxing, etc., Timber on Public Land for Turpentine, etc.

Whoever shall cut, chip, chop, or box any tree upon any lands belonging to the United States, or upon any lands covered by or embraced in any unperfected settlement, application, filing, entry, selection, or location, made under any law of the United States, for the purpose of obtaining from such tree any pitch, turpentine, or other substance, or shall knowingly encourage, cause, procure, or aid in the cutting, chipping, chopping, or boxing of any such tree, or shall buy, trade for, or in any manner acquire any pitch, turpentine, or other substance, or any article or commodity made from any such pitch, turpentine, or other substance, when he has knowledge that the same has been so unlawfully obtained from such trees, shall be fined not more than five hundred dollars, or imprisoned not more than one year, or both.¹

The Supreme Court has stated that the effect of this section was to make criminal that which before was merely actionable civilly, and that ignorance of the law will not excuse the offense.²

§ 713. Criminal Code. Sec. 52. Setting Fire to Timber on Public Lands.

Whoever shall willfully set on fire, or cause to be set on fire, any timber, underbrush, or grass upon the public domain, or shall leave or suffer fire to burn unattended near any timber or other inflammable material, shall be fined not more than five thousand dollars, or imprisoned not more than two years, or both.¹

§ 714. Criminal Code. Sec. 53. Failing to Extinguish Fires.

Whoever shall build a fire in or near any forest, timber, or other inflammable material upon the public domain, or upon any Indian reservation, or lands belonging to or occupied by any tribe of Indians under the authority of the United States, or upon any Indian allotment while the title to the same shall be held in trust by the Govern-

687. *See also* United States *v.* Grimaud, 220 U. S. 506, 55 L. ed. 563, 31 S. C. 480.

§ 712. ¹ 35 Stat. L. 1098.

² Union Naval Stores Co. *v.* United States, 240 U. S. 284, 60 L. ed. 644, 36 S. C. 308.

§ 713. ¹ 35 Stat. L. 1098.

ment, or while the same shall remain inalienable by the allottee without the consent of the United States.¹

§ 715. Criminal Code. Sec. 54. Fines to Be Paid into School Fund.

In all cases arising under the two preceding sections the fines collected shall be paid into the public school fund of the county in which the lands where the offense was committed are situated.¹

§ 716. Criminal Code. Sec. 55. Trespassing on Bull Run National Forest, Oregon.

Whoever, except forest rangers and other persons employed by the United States, to protect the forest, federal, and state officers in the discharge of their duties, and the employees of the water board of the city of Portland, State of Oregon, shall knowingly trespass upon any part of the reserve known as Bull Run National Forest, in the Cascade Mountains, in the State of Oregon, or shall enter thereon for the purpose of grazing stock, or shall engage in grazing stock thereon, or shall permit stock of any kind to graze thereon, shall be fined not more than five hundred dollars, or imprisoned not more than six months, or both.¹

§ 717. Criminal Code. Sec. 56. Breaking Fence or Gate Inclosing Reserved Lands, or Driving or Permitting Live Stock to Enter Upon.

Whoever shall knowingly and unlawfully break, open, or destroy any gate, fence, hedge, or wall inclosing any lands of the United States, which, in pursuance of any law, have been reserved or purchased by the United States for any public use; or whoever shall drive any cattle, horses, hogs, or other live stock upon any such lands for the purpose of destroying the grass or trees on said lands, or where they may destroy the said grass or trees; or whoever shall knowingly permit his cattle, horses, hogs, or other live stock, to enter through any such inclosure upon any such lands of the United States, where such cattle, horses, hogs,

§ 714. ¹ 35 Stat. L. 1098, as amended; 36 Stat. 857.

§ 715. ¹ 35 Stat. L. 1099.

§ 716. ¹ 35 Stat. L. 1099.

or other live stock may or can destroy the grass or trees or other property of the United States on the said lands, shall be fined not more than five hundred dollars, or imprisoned not more than one year, or both: *Provided*, That nothing in this section shall be construed to apply to unreserved public lands.¹

§ 718. Criminal Code. Sec. 57. Injuring or Removing Posts or Monuments.

Whoever shall willfully destroy, deface, change, or remove to another place any section corner, quarter-section corner, or meander post, on any Government line of survey, or shall willfully cut down any witness tree or any tree blazed to mark the line of a Government survey, or shall willfully deface, change, or remove any monument or bench mark of any Government survey, shall be fined not more than two hundred and fifty dollars, or imprisoned not more than six months, or both.¹

§ 719. Criminal Code. Sec. 58. Interrupting Surveys.

Whoever in any manner, by threats or force, shall interrupt, hinder, or prevent the surveying of the public lands, or of any private land claim which has been or may be confirmed by the United States, by the persons authorized to survey the same, in conformity with the instructions of the Commissioner of the General Land Office, shall be fined not more than three thousand dollars and imprisoned not more than three years.¹

A surveyor was sent by the Land Office to survey certain lands which were claimed and appropriated by a private corporation. The defendant willfully and feloniously interfered with the surveyor. The defendant, being indicted, filed a demurrer and made the contention that the land did not belong to the United States and that it had been withdrawn from sale. *Held*, that as the corporation merely had a claim to the land and as the United States had not yet issued any patent, it was still the property of the government and that therefore the indictment was valid.²

§ 717. ¹ 35 Stat. L. 1099.

² *United States v. Fickett*, 205

§ 718. ¹ 35 Stat. L. 1099.

Fed. 134, 123 C. C. A. 366 (9th Cir.).

§ 719. ¹ Formerly R. S. Sec. 2412,
35 Stat. L. 1099.

§ 720. Criminal Code. Sec. 59. Agreements to Prevent Bids at Sale of Lands.

Whoever, before or at the time of the public sale of any of the lands of the United States, shall bargain, contract, or agree, or attempt to bargain, contract, or agree with any other person, that the last-named person shall not bid upon or purchase the land so offered for sale, or any parcel thereof; or whoever by intimidation, combination, or unfair management shall hinder or prevent, or attempt to hinder or prevent, any person from bidding upon or purchasing any tract of land so offered for sale, shall be fined not more than one thousand dollars, or imprisoned not more than two years, or both.¹

The Government is the only party that can object to any agreement preventing bidding.²

§ 721. Criminal Code. Sec. 60. Injuries to United States Telegraph, etc., Lines.

Whoever shall willfully or maliciously injure or destroy any of the works, property, or material of any telegraph, telephone, or cable line, or system, operated or controlled by the United States, whether constructed or in process of construction, or shall willfully or maliciously interfere in any way with the working or use of any such line, or system, or shall willfully or maliciously obstruct, hinder, or delay the transmission of any communication over any such line, or system, shall be fined not more than one thousand dollars, or imprisoned not more than three years, or both.¹

§ 722. Criminal Code. Sec. 61. Counterfeiting Weather Forecast.

Whoever shall knowingly issue or publish any counterfeit weather forecast or warning of weather conditions falsely representing such forecast or warning to have been issued or published by the Weather Bureau, United States Signal Service, or other branch of the Government

§ 720. ¹ Formerly R. S. Sec. 2373, 35 Stat. L. 1099.

² *Easley v. Kellon*, 14 Wall. 279,

20 L. ed. 890; *Root v. Shields*, 20 Fed. Cas. No. 12038.

§ 721. ¹ 35 Stat. L. 1099.

service, shall be fined not more than five hundred dollars, or imprisoned not more than ninety days, or both.¹

§ 723. Criminal Code. Sec. 62. Interfering with Employees of Bureau of Animal Industry.

Whoever shall forcibly assault, resist, oppose, prevent, impede, or interfere with any officer or employee of the Bureau of Animal Industry of the Department of Agriculture in the execution of his duties, or on account of the execution of his duties, shall be fined not more than one thousand dollars, or imprisoned not more than one year, or both; and whoever shall use any deadly or dangerous weapon in resisting any officer or employee of the Bureau of Animal Industry of the Department of Agriculture in the execution of his duties, with intent to commit a bodily injury upon him or to deter or prevent him from discharging his duties, or on account of the performance of his duties, shall be fined not more than one thousand dollars, or imprisoned not more than five years, or both.¹

§ 724. Criminal Code. Sec. 63. Forgery of Certificate of Entry.

Whoever shall forge, counterfeit, or falsely alter any certificate of entry made or required to be made in pursuance of law, by an officer of the customs, or shall use any such forged, counterfeited, or falsely altered certificate, knowing the same to be forged, counterfeited, or falsely altered, shall be fined not more than ten thousand dollars and imprisoned not more than three years.¹

§ 725. Criminal Code. Sec. 64. Concealment or Destruction of Invoices, etc.

Whoever shall willfully conceal or destroy any invoice, book, or paper relating to any merchandise liable to duty, which has been or may be imported into the United States from any foreign port or country, after an inspection thereof has been demanded by the collector of any collection district, or shall at any time conceal or destroy any such invoice, book, or paper for the purpose of suppressing any

§ 722. ¹ 35 Stat. L. 1100.

§ 723. ¹ 35 Stat. L. 1100.

§ 724. ¹ Formerly R. S. Sec. 5417,
35 Stat. L. 1100.

evidence of fraud therein contained, shall be fined not more than five thousand dollars, or imprisoned not more than two years, or both.¹

§ 726. Criminal Code. Sec. 65 Resisting Revenue Officer; Rescuing or Destroying Seized Property, etc.

Whoever shall forcibly assault, resist, oppose, prevent, impede, or interfere with any officer of the customs or of the internal revenue, or his deputy, or any person assisting him in the execution of his duties, or any person authorized to make searches and seizures, in the execution of his duty, or shall rescue, attempt to rescue, or cause to be rescued, any property which has been seized by any person so authorized; or whoever before, at, or after such seizure, in order to prevent the seizure or securing of any goods, wares, or merchandise by any person so authorized, shall stave, break, throw overboard, destroy, or remove the same, shall be fined not more than two thousand dollars, or imprisoned not more than one year, or both; and whoever shall use any deadly or dangerous weapon in resisting any person authorized to make searches or seizures, in the execution of his duty, with intent to commit a bodily injury upon him or to deter or prevent him from discharging his duty, shall be imprisoned not more than ten years.¹

The complainant, an inspector of customs, was assigned to a certain pier to await the arrival of a ship and to watch the discharge of its cargo. While waiting for the ship he was seated in a small frame house on the dock reading some papers. The defendant entered and, some words ensuing, he then attacked the complainant. It was held that the indictment was good because the complainant at the time of the assault was engaged in official duties.² An inspector of customs sought to capture certain Chinese laborers who were not entitled to be in the United States. The defendant handcuffed the inspector of customs and otherwise interfered with the attempted capture. It was held that inasmuch

§ 725. ¹ Formerly R. S. Sec. 5443,
35 Stat. L. 1100.

² United States v. McEwan, 44
Fed. 594.

§ 726. ¹ Formerly R. S. Sec. 5447,
35 Stat. L. 1100.

as it was no part of the official duties of the inspector to make such captures the defendant could not be indicted under this section.³ This section applies exclusively to offenses committed against officers of the customs, their deputies, etc., and has no application to an act done in resistance of an Indian agent in making searches or seizures upon an Indian reservation.⁴ This section does not apply to a sheriff acting under a writ issued by a State court, as in that case the intent is not to interfere or impede the customs officer.⁵

§ 727. Criminal Code. Sec. 66. Falsely Assuming to Be a Revenue Officer.

Whoever shall falsely represent himself to be a revenue officer, and, in such assumed character, demand or receive any money or other article of value from any person for any duty or tax due to the United States, or for any violation or pretended violation of any revenue law of the United States, shall be fined not more than five hundred dollars, and imprisoned not more than two years.¹

An indictment charging in one count false impersonation of revenue officers and in another count the false assumption of the office of a revenue officer with intent to extort money from various persons was upheld.²

§ 728. Criminal Code. Sec. 67. Offering Presents to Revenue Officer.

Whoever, being engaged in the importation into the United States of any goods, wares, or merchandise, or being interested as principal, clerk, or agent in the entry of any goods, wares, or merchandise, shall at any time make, or offer to make, to any officer of the revenue, any gratuity or present of money or other thing of value, shall be fined not more than five thousand dollars, or imprisoned not more than two years, or both.¹

³ United States v. Baird, 48 Fed. 554.

⁴ Mackey v. Miller, 126 Fed. 161, 62 C. C. A. 139 (9th Cir.).

⁵ Ex parte Murray, 35 Fed. 496.

§ 727. ¹ Formerly R. S. Sec. 5448, 35 Stat. L. 1100.

² United States v. Brown, 119 Fed. 482.

§ 728. ¹ Formerly R. S. Sec. 5452, 35 Stat. L. 1100.

§ 729. Criminal Code. Sec. 68. Admitting Merchandise to Entry for Less than Legal Duty.

Whoever, being an officer of the revenue, shall, by any means whatever, knowingly admit or aid in admitting to entry, any goods, wares, or merchandise, upon payment of less than the amount of duty legally due thereon, shall be removed from office and fined not more than five thousand dollars, or imprisoned not more than two years, or both.¹

The words "admits or aids in admitting" used in an indictment are not bad for duplicity.² The defendants must be tried in the district where the conspiracy was formed.³ The extradition treaty with Great Britain covers a violation of this section.⁴ It is immaterial that the officer charged with the crime was not acting strictly within the line of his regular duties.⁵ The courts have defined "entry" as the whole process of passing goods through the custom house.⁶

§ 730. Criminal Code. Sec. 69. Securing Entry of Merchandise by False Samples, etc.

Whoever, by any means whatever, shall knowingly effect, or aid in effecting, any entry of goods, wares, or merchandise, at less than the true weight or measure thereof, or upon a false classification thereof as to quality or value, or by the payment of less than the amount of duty legally due thereon, shall be fined not more than five thousand dollars, or imprisoned not more than two years, or both.¹

Indictments for conspiracy to violate this section were upheld, and plea of immunity refused under the facts in the particular case.² Section 9 of the customs administrative act of 1890 did

§ 729. ¹ Formerly R. S. Sec. 5444, 35 Stat. L. 1101.

² United States v. Mescall, 164 Fed. 584.

³ United States v. McMahon, 175 Fed. 296.

⁴ Ex parte Browne, 148 Fed. 68, affirmed in 205 U. S. 309, 51 L. ed. 816, 27 S. C. 539.

⁵ United States v. Rosenthal, 126 Fed. 766, 774, affirmed 145 Fed. 1,

76 C. C. A. 31 (2d Cir.), *certiorari denied*, 200 U. S. 618, 50 L. ed. 623, 26 S. C. 755.

⁶ United States v. Mescall, 164 Fed. 584.

§ 730. ¹ Formerly R. S. Sec. 5445, 35 Stat. L. 1101.

² Heike v. United States, 192 Fed. 83, 112 C. C. A. 615 (2d Cir.), *affirmed* in 227 U. S. 131, 57 L. ed. 450, 33 S. C. 226.

not repeal this section.³ The five years' statute of limitations applies in cases under this section.⁴ "Entry" means the entire transaction by which the importer obtains the entrance of his goods into the United States.⁵ The fact that the goods were improperly sent to an "examiner" instead of a "surveyor" by the Customs authorities, and that such "examiner" aided the defendants in the commission of the crime cannot be availed of by the defendants.⁶

§ 731. Criminal Code. Sec. 70. False Certification by Consular Officer.

Whoever, being a consul, or vice-consul, or other person employed in the consular service of the United States, shall knowingly certify falsely to any invoice, or other paper, to which his certificate is by law authorized or required, shall be fined not more than ten thousand dollars and imprisoned not more than three years.¹

§ 732. Criminal Code. Sec. 71. Taking Seized Property from Custody of Revenue Officer.

Whoever shall dispossess or rescue, or attempt to dispossess or rescue, any property taken or detained by any officer or other person under the authority of any revenue law of the United States, or shall aid or assist therein, shall be fined not more than three hundred dollars and imprisoned not more than one year.¹

Threatening language which would cause ordinarily brave men to desist in the performance of their duties is such a crime.²

³ *Heike v. United States*, 192 Fed. 83, 92, 112 C. C. A. 615 (2d Cir.).

⁴ *United States v. Rabinowich*, 238 U. S. 78, 89, 59 L. ed. 1211, 35 S. C. 682; *United States v. Hirsch*, 100 U. S. 33, 25 L. ed. 539.

⁵ *United States v. Mescall*, 164 Fed. 580, 583, following Judge Blatchford in *United States v. Baker*, 5 Ben. 25, Fed. Cas. No. 14500.

⁶ *United States v. Rosenthal*, 120

Fed. 766, *affirmed* in 145 Fed. 1, 76 C. C. A. 31 (2d Cir.), *certiorari denied*, 200 U. S. 618, 50 L. ed. 623, 26 S. C. 755.

§ 731. ¹ Formerly R. S. Sec. 5442, 35 Stat. L. 1101.

§ 732. ¹ Formerly R. S. Sec. 5446, 35 Stat. L. 1101.

² *United States v. Ford*, 33 Fed. 861.

§ 733. Criminal Code. Sec. 72. Forging or Altering Ship's Papers or Custom-house Documents.

Whoever shall falsely make, forge, counterfeit, or alter any instrument in imitation of, or purporting to be, an abstract or official copy or certificate of the recording, registry, or enrollment of any vessel, in the office of any collector of the customs, or a license to any vessel for carrying on the coasting trade or fisheries of the United States, or a certificate of ownership, pass, passport, sea letter, or clearance, granted for any vessel, under the authority of the United States, or a permit, debenture, or other official document granted by any collector or other officer of the customs by virtue of his office; or whoever shall utter, publish, or pass, or attempt to utter, publish, or pass, as true, any such false, forged, counterfeited, or falsely altered instrument, abstract, official copy, certificate, license, pass, passport, sea letter, clearance, permit, debenture, or other official document herein specified knowing the same to be false, forged, counterfeited, or falsely altered with an intent to defraud, shall be fined not more than one thousand dollars and imprisoned not more than three years.¹

The forged document may contain the printed signature of the officer purporting to issue such document.²

§ 734. Criminal Code. Sec. 73. Forging Military Bounty-land Warrant, etc.

Whoever shall falsely make, alter, forge, or counterfeit any military bounty-land warrant, or military bounty-land warrant certificate, issued or purporting to have been issued by the Commissioner of Pensions under any law of Congress, or any certificate or duplicate certificate of location of any military bounty-land warrant, or military bounty-land warrant certificate upon any of the lands of the United States, or any certificate or duplicate certificate of the purchase of any of the lands of the United States, or any receipt or duplicate receipt for the purchase money of the lands of the United States, issued or purporting to

§ 733. ¹ Formerly R. S. Sec. 5423,
35 Stat. L. 1101.

² United States *v.* Schoyer, 2
Blatchf. 59, Fed. Cas. No. 16232.

have been issued by the register and receiver at any land office of the United States or by either of them; or whoever shall utter, publish, or pass as true, any such false, forged, or counterfeited military bounty-land warrant, military bounty-land warrant certificate, certificate or duplicate certificate of location, certificate or duplicate certificate of purchase, receipt or duplicate receipt for the purchase money of any of the lands of the United States, knowing the same to be false, forged, or counterfeited, shall be imprisoned not more than ten years.¹

§ 735. Criminal Code. Sec. 74. Forging, etc., Certificate of Citizenship.

Whoever shall falsely make, forge, or counterfeit, or cause or procure to be falsely made, forged, or counterfeited, shall knowingly aid or assist in falsely making, forging, or counterfeiting any certificate of citizenship, with intent to use the same, or with the intent that the same may be used by some other person, shall be fined not more than ten thousand dollars, or imprisoned not more than ten years, or both.¹

§ 736. Criminal Code. Sec. 75. Engraving, etc., Plate for Printing, or Photographing, Selling, or Bringing into United States, etc., Certificate of Citizenship.

Whoever shall engrave, or cause or procure to be engraved, or assist in engraving, any plate in the likeness of any plate designed for the printing of a certificate of citizenship; or whoever shall sell any such plate, or shall bring into the United States from any foreign place any such plate, except under the direction of the Secretary of Commerce and Labor or other proper officer; or whoever shall have in his control, custody, or possession any metallic plate engraved after the similitude of any plate from which any such certificate has been printed, with intent to use or to suffer such plate to be used in forging or counterfeiting any such certificate or any part thereof; or whoever shall print, photograph, or in any manner cause

§ 734. ¹ Formerly R. S. Sec. 5420,
35 Stat. L. 1101.

§ 735. ¹ 35 Stat. L. 1102.

to be printed, photographed, made, or executed, any print or impression in the likeness of any such certificate, or any part thereof; or whoever shall sell any such certificate, or shall bring the same into the United States from any foreign place, except by direction of some proper officer of the United States; or whoever shall have in his possession a distinctive paper which has been adopted by the proper officer of the United States for the printing of such certificate, with intent unlawfully to use the same, shall be fined not more than ten thousand dollars, or imprisoned not more than ten years, or both.¹

§ 737. Criminal Code. Sec. 76. False Personation, etc., in Procuring Naturalization.

Whoever, when applying to be admitted a citizen, or when appearing as a witness for any such person, shall knowingly personate any person other than himself, or shall falsely appear in the name of a deceased person, or in an assumed or fictitious name; or whoever shall falsely make, forge, counterfeit any oath, notice, affidavit, certificate, order, record, signature, or other instrument, paper, or proceeding required or authorized by any law relating to or providing for the naturalization of aliens; or whoever shall utter, sell, dispose of, or shall use as true or genuine, for any unlawful purpose, any false, forged, antedated, or counterfeit oath, notice, certificate, order, record, signature, instrument, paper, or proceeding above specified; or whoever shall sell or dispose of to any person other than the person for whom it was originally issued any certificate of citizenship or certificate showing any person to be admitted a citizen, shall be fined not more than one thousand dollars, or imprisoned not more than five years, or both.¹

It was held that the legislative intent was to make this offense a misdemeanor and not a felony,² but the decision on this point is not in harmony with Section 335 of the Federal Criminal Code providing that all offenses which may be punished by imprisonment for a term exceeding one year, shall be deemed felonies.

§ 736. ¹ 35 Stat. L. 1102.

² United States v. York, 131 Fed.

§ 737. ¹ Formerly R. S. Sec. 5424, 323.

35 Stat. L. 1102.

This section refers to certificates or other writings and not to testimony.³ If the oath alleged to be false is either "required or authorized" by the naturalization laws, the crime is complete.⁴ This section prohibits all selling of naturalization papers whether genuine or forged, and whether valid or invalid.⁵ The statute covers forgeries committed by persons other than applicants for naturalization.⁶ The prohibition extends against any one applying for naturalization in a fictitious or assumed name.⁷

§ 738. Criminal Code. Sec. 77. Using False Certificate of Citizenship or Denying Citizenship, etc.

Whoever shall use or attempt to use, or shall aid, assist, or participate in the use of any certificate of citizenship, knowing the same to be forged, counterfeit, or antedated, or knowing the same to have been procured by fraud or otherwise unlawfully obtained; or whoever, without lawful excuse, shall knowingly possess any false, forged, antedated, or counterfeit certificate of citizenship purporting to have been issued under any law of the United States relating to naturalization, knowing such certificate to be false, forged, antedated, or counterfeit, with the intent unlawfully to use the same; or whoever shall obtain, accept, or receive any certificate of citizenship, knowing the same to have been procured by fraud or by the use or means of any false name or statement given or made with the intent to procure, or to aid in procuring, the issuance of such certificate, or knowing the same to have been fraudulently altered or antedated; or whoever, without lawful excuse, shall have in his possession any blank certificate of citizenship provided by the Bureau of Immigration and Naturalization with the intent unlawfully to use the same; or whoever, after having been admitted to be a citizen, shall, on oath or by affidavit, knowingly deny that he has been so admitted, with the intent to evade or avoid any duty or liability imposed or required by law, shall be fined not

³ United States v. Lehman, 39 Fed. 768.

⁴ United States v. Lehman, 39 Fed. 49.

⁵ United States v. Ragazzini, 50 Fed. 923.

⁶ United States v. Raisch, 144 Fed. 486.

⁷ In re Boorvis, 205 Fed. 401.

more than one thousand dollars, or imprisoned not more than five years, or both.¹

The nationality of the persons for whom the certificates were obtained must appear in the indictment.² The acceptance of the certificate from the clerk of the court, or from the judge, knowing that the same has been procured by fraud or false testimony is made a crime.³ There being no federal law under which certificates of citizenship are issued, the statute "refers to certificates which purport upon their face to have been issued after a compliance . . . with the naturalization laws. . . ." ⁴ Actual use of the false certificate is not necessary.⁵ A person pleading guilty to an indictment under this statute may testify against the person who committed perjury in aiding in the procurement of the false certificate.⁶

§ 739. Criminal Code. Sec. 78. Using False Certificate, etc., as Evidence of Right to Vote, etc.

Whoever shall in any manner use, for the purpose of registering as a voter, or as evidence of a right to vote, or otherwise unlawfully, any order, certificate of citizenship, or certificate, judgment, or exemplification, showing any person to be admitted to be a citizen whether heretofore or hereafter issued or made, knowing that such order, certificate, judgment, or exemplification has been unlawfully issued or made; or whoever shall unlawfully use, or attempt to use, any such order or certificate, issued to or in the name of any other person, or in a fictitious name, or the name of a deceased person, shall be fined not more than one thousand dollars, or imprisoned not more than five years, or both.¹

Merely alleging that the use of the certificate of naturalization was "unlawful" is insufficient.² "Certificate of citizenship"

§ 738. ¹ Formerly R. S. Sec. 5425, 35 Stat. L. 1102.

² *United States v. Melfi*, 118 Fed. 899.

³ *United States v. Lehman*, 39 Fed. 768.

⁴ *Dolan v. United States*, 133 Fed. 440, 69 C. C. A. 274 (8th Cir.).

⁵ *Green v. United States*, 150 Fed. 560, 80 C. C. A. 362 (9th Cir.).

⁶ *O'Leary v. United States*, 158 Fed. 796, 86 C. C. A. 56 (1st Cir.).

§ 739. ¹ Formerly R. S. Sec. 5426, 35 Stat. L. 1103.

² *In re Coleman*, 15 Blatchf. 406, Fed. Cas. No. 2980.

is not confined to a document which purports to certify the legal effect of judicial action in naturalization proceedings.³ The fact that the defendant knew that the certificate of naturalization was issued without his presence in Court, and without any oath having been taken by him, is of itself insufficient to sustain a conviction.⁴ It is not required of an applicant for citizenship to see to it that the proper entries are made in the Court minutes. When he has gone through the formalities required of him, he has reason to believe that the certificate issued to him is legal.⁵

§ 740. Criminal Code. Sec. 79. Falsely Claiming Citizenship.

Whoever shall knowingly use any certificate of naturalization heretofore or which hereafter may be granted by any court, which has been or may be procured through fraud or by false evidence, or which has been or may hereafter be issued by the clerk or any other officer of the court without any appearance and hearing of the applicant in court and without lawful authority; or whoever, for any fraudulent purpose whatever, shall falsely represent himself to be a citizen of the United States without having been duly admitted to citizenship, shall be fined not more than one thousand dollars, or imprisoned not more than two years, or both.¹

One who swears falsely before a deputy registrar that he is a citizen in order that he may be registered as a voter is guilty of the crime denounced by this statute.² A person who has obtained his certificate of citizenship after observance of the necessary formalities, and this certificate is not annulled or vacated, cannot be charged with unlawfully representing himself as a citizen.³ One who represents himself to be a citizen when he has merely declared his intentions and two years has elapsed is guilty of a

³ *Dolan v. United States*, 133 Fed. 440, 69 C. C. A. 274 (8th Cir.).

⁴ *United States v. Burley*, 14 Blatchf. 91, Fed. Cas. No. 14686, but this rule has now been changed by statute, which provides the mode of issuing naturalization certificates.

⁵ *In re Coleman*, 15 Blatchf. 406, Fed. Cas. No. 2980.

§ 740. ¹ Formerly R. S. Sec. 5428, 35 Stat. L. 1103.

² *Green v. United States*, 150 Fed. 560, 80 C. C. A. 362 (9th Cir.).

³ *United States v. Hamilton*, 157 Fed. 569.

violation of this statute.⁴ One who has pleaded guilty to an indictment under this statute within five years preceding his application for citizenship may not be admitted to citizenship.⁵ An alien who obtained admission into this country by falsely representing that he is a United States citizen cannot in a proceeding before the Immigration Commissioner plead as *res adjudicata* his acquittal of a charge under this section.⁶

§ 741. Criminal Code. Sec. 80. Taking False Oath in Naturalization Proceedings.

Whoever, in any proceeding under or by virtue of any law relating to the naturalization of aliens, shall knowingly swear falsely in any case where an oath is made or affidavit taken, shall be fined not more than one thousand dollars and imprisoned not more than five years.¹

The indictment need not set forth in verbatim the declaration which it is alleged was falsely sworn to.² A fatal variance between the indictment and the proof will result in the conviction being reversed.³ False swearing in a naturalization proceeding in a State Court is punishable under this statute.⁴ The intention of the legislature was to cover false swearing in naturalization proceedings in all courts.⁵ This section relates to false swearing in open court.⁶ The evidence given in such proceeding must be material.⁷ This section refers to an oath which the law relative to naturalization requires or authorizes the party to take.⁸

⁴ *Christopoulos v. United States*, 230 Fed. 788, 145 C. C. A. 98 (4th Cir.).

⁵ *In re Guliano*, 156 Fed. 420.

⁶ *Williams v. United States*, ex rel. Bougadis, 186 Fed. 479, 108 C. C. A. 457 (2d Cir.).

§ 741. 'Formerly R. S. Sec. 5395, 35 Stat. L. 1103.

² *United States v. Walsh*, 22 Fed. 644.

³ *Moore v. United States*, 144 Fed. 962, 75 C. C. A. 670 (1st Cir.).

⁴ *Holmgren v. United States*, 217 U. S. 509, 54 L. ed. 861, 30 S. C. 588,

affirming 156 Fed. 439, 84 C. C. A. 301 (9th Cir.); *Schmidt v. United States*, 133 Fed. 257, 66 C. C. A. 389 (9th Cir.). *See also* *United States v. Severino*, 125 Fed. 949.

⁵ *Schmidt v. United States*, 133 Fed. 257, 66 C. C. A. 389 (9th Cir.).

⁶ *United States v. Lehman*, 39 Fed. 768.

⁷ *United States v. Bressi*, 208 Fed. 369; *United States v. Dupont*, 176 Fed. 823.

⁸ *United States v. Grottkau*, 30 Fed. 672.

§ 742. Criminal Code. Sec. 81. Provisions Applicable to All Courts of Naturalization.

The provisions of the five sections last preceding shall apply to all proceedings had or taken, or attempted to be had or taken, before any court in which any proceeding for naturalization may be commenced or attempted to be commenced, and whether such court was vested by law with jurisdiction in naturalization proceedings or not.¹

§ 743. Criminal Code. Sec. 82. Shanghaiing and Falsely Inducing Person Intoxicated to Go on Vessel Prohibited.

Whoever, with intent that any person shall perform service or labor of any kind on board of any vessel engaged in trade and commerce among the several States or with foreign nations, or on board of any vessel of the United States engaged in navigating the high seas or any navigable water of the United States, shall procure or induce, or attempt to procure or induce, another, by force or threats or by representations which he knows or believes to be untrue, or while the person so procured or induced is intoxicated or under the influence of any drug, to go on board of any such vessel, or to sign or in anywise enter into any agreement to go on board of any such vessel to perform service or labor thereon; or whoever shall knowingly detain on board of any such vessel any person so procured or induced to go on board thereof, or to enter into any agreement to go on board thereof, by any means herein defined; or whoever shall knowingly aid or abet in the doing of any of the things herein made unlawful, shall be fined not more than one thousand dollars, or imprisoned not more than one year, or both.¹

The offense denounced is "the taking of any person aboard while intoxicated, to labor, who had been previously procured or induced to such service *by force or threats, or by representations known to be false.*"²

§ 742. ¹ Formerly R. S. Sec. 5429,
35 Stat. L. 1103.

² United States v. Domingos, 193
Fed. 263.

§ 743. ¹ 35 Stat. L. 1103.

§ 744. Criminal Code. Sec. 83. Corporations, etc., Not to Contribute Money for Political Elections, etc.

It shall be unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a money contribution in connection with any election to any political office. It shall also be unlawful for any corporation whatever to make a money contribution in connection with any election at which Presidential and Vice-Presidential electors or a Representative in Congress is to be voted for, or any election by any State legislature of a United States Senator. Every corporation which shall make any contribution in violation of the foregoing provisions shall be fined not more than five thousand dollars; and every officer or director of any corporation who shall consent to any contribution by the corporation in violation of the foregoing provisions shall be fined not more than one thousand dollars, or imprisoned not more than one year, or both.¹

The constitutionality of this section has been upheld.²

§ 745. Criminal Code. Sec. 84. Hunting Birds, or Taking Their Eggs from Breeding Grounds, Prohibited.

Whoever shall hunt, trap, capture, willfully disturb, or kill any bird of any kind whatever, or take the eggs of any such bird, on any lands of the United States which have been set apart or reserved as breeding grounds for birds, by any law, proclamation, or executive order, except under such rules and regulations as the Secretary of Agriculture may from time to time prescribe, shall be fined not more than five hundred dollars, or imprisoned not more than six months, or both.¹

§ 744. ¹ 35 Stat. L. 1103.

² *United States v. United States Brewers' Ass'n*, 239 Fed. 163. For a case involving an investigation by a grand jury as to political expenses,

failure to answer questions, contempt proceedings, writs of *habeas corpus* and writs of error, *see* *Ex Parte Fox*, 236 Fed. 861, 150 C. C. A. 123 (3rd Cir.).

§ 745. ¹ 35 Stat. L. 1104.

CHAPTER L

CRIMINAL CODE, CHAPTER FIVE

OFFENSES RELATING TO OFFICIAL DUTIES

- § 746. Crim. Code § 85. Officer, etc., of the United States, Guilty of Extortion.
- § 747. Crim. Code § 86. Receipting for Larger Sums than Are Paid.
- § 748. Crim. Code § 87. Disbursing Officer Unlawfully Converting, etc., Public Money.
- § 749. Crim. Code § 88. Failure of Treasurer, etc., to Safely Keep Public Money.
- § 750. Crim. Code § 89. Custodian of Public Money Failing to Safely Keep, etc.
- § 751. Crim. Code § 90. Failure of Officer to Render Accounts, etc.
- § 752. Crim. Code § 91. Failure to Deposit as Required.
- § 753. Crim. Code § 92. Provisions of the Five Preceding Sections, to Whom Applicable.
- § 754. Crim. Code § 93. Record Evidence of Embezzlement.
- § 755. Crim. Code § 94. *Prima Facie* Evidence.
- § 756. Crim. Code § 95. Evidence of Conversion.
- § 757. Crim. Code § 96. Banker, etc., Receiving Deposit from Disbursing Officer.
- § 758. Crim. Code § 97. Embezzlement by Internal-Revenue Officer, etc.
- § 759. Crim. Code § 98. Officer Contracting beyond Specific Appropriation.
- § 760. Crim. Code § 99. Officer of United States Court Failing to Deposit Moneys, etc.
- § 761. Crim. Code § 100. Receiving Loan or Deposit from Officer of Court.
- § 762. Crim. Code § 101. Failure to Make Returns or Reports.
- § 763. Crim. Code § 102. Aiding in Trading in Obscene Literature.
- § 764. Crim. Code § 103. Collecting and Disbursing Officers Forbidden to Trade in Public Property.
- § 765. Crim. Code § 104. Certain Officers Forbidden to Purchase, etc., Witness, etc., Fees.
- § 766. Crim. Code § 105. Falsely Certifying, etc., as to Record of Deeds, etc.

- § 767. Crim. Code § 106. Other False Certificates.
- § 768. Crim. Code § 107. Inspector of Steamboats Receiving Illegal Fees.
- § 769. Crim. Code § 108. Pension Agent Taking Fee, etc.
- § 770. Crim. Code § 109. Officer Not to Be Interested in Claims against the United States.
- § 771. Crim. Code § 110. Member of Congress, etc., Soliciting or Accepting Bribe, etc.
- § 772. Crim. Code § 111. Offering, etc., Member of Congress, Bribe, etc.
- § 773. Crim. Code § 112. Member of Congress Taking Consideration of Procuring Contract, Office, etc.; Offering Member Consideration, etc.
- § 774. Crim. Code § 113. Member of Congress, etc., Taking Compensation in Matters to Which United States Is a Party.
- § 775. Crim. Code § 114. Member of Congress Not to Be Interested in Contract.
- § 776. Crim. Code § 115. Officer Making Contracts with Member of Congress.
- § 777. Crim. Code § 116. Contracts to Which Two Preceding Sections Do Not Apply.
- § 778. Crim. Code § 117. United States Officer Accepting Bribe.
- § 779. Crim. Code § 118. Political Contributions Not to Be Solicited by Certain Officers.
- § 780. Crim. Code § 119. Political Contributions Not to Be Received in Public Offices.
- § 781. Crim. Code § 120. Immunity from Official Proscriptions.
- § 782. Crim. Code § 121. Giving Money to Officials for Political Purposes Prohibited.
- § 783. Crim. Code § 122. Penalty for Violating Provisions of Four Preceding Sections.
- § 784. Crim. Code § 123. Governmental Officer, etc., Giving Out Advance Information Respecting Crop Reports.
- § 785. Crim. Code § 124. Government Officer, etc., Knowingly Compiling or Issuing False Statistics Respecting Crops.

§ 746. Criminal Code. Sec. 85. Officer, etc., of the United States Guilty of Extortion.

Every officer, clerk, agent, or employee of the United States, and every person representing himself to be or assuming to act as such officer, clerk, agent, or employee, who under color of his office, clerkship, agency, or employment or under color of his pretended or assumed office, clerkship, agency or employment, is guilty of extortion, and every person who shall attempt any act which if performed would make him guilty of extortion, shall be

fined not more than five hundred dollars, or imprisoned not more than one year, or both.¹

In a prosecution under this section it is improper to show the bank balance of the defendant or his wife unless connected by evidence tending to show that the money on deposit in the bank was part of the proceeds of the extortion.² Extortion may be defined as taking any money or thing of value unlawfully by any officer under color of his office.³ The money must be paid over unwillingly by the person paying it.⁴ This section is broad enough to include a Chinese Inspector,⁵ and it also includes a special agent of the General Land Office.⁶ But it does not include civil surgeons appointed by the Commissioner of Pensions.⁷

§ 747. Criminal Code. Sec. 86. Receipting for Larger Sums than Are Paid.

Whoever, being an officer, clerk, agent, employee, or other person charged with the payment of any appropriation made by Congress, shall pay to any clerk or other employee of the United States a sum less than that provided by law, and require such employee to receipt or give a voucher for an amount greater than that actually paid to and received by him, is guilty of embezzlement, and shall be fined in double the amount so withheld from any employee of the Government and imprisoned not more than two years.¹

A postmaster of an "experimental free delivery" station is an officer within the meaning of this section.²

§ 748. Criminal Code. Sec. 87. Disbursing Officer Unlawfully Converting, etc., Public Money.

Whoever, being a disbursing officer of the United States, or a person acting as such, shall in any manner convert

¹ **§ 746.** Formerly R. S. Sec. 5481, 35 Stat. L. 1104.

² *Williams v. United States*, 168 U. S. 382, 42 L. ed. 509, 18 S. C. 92.

³ *United States v. Bloomgart*, 2 Ben. 356, 24 Fed. Cas. No. 14612.

⁴ *United States v. Harned*, 43 Fed. 376.

⁵ *Williams v. United States*, 168 U. S. 382, 42 L. ed. 509, 18 S. C. 92.

⁶ *United States v. Schlierholz*, 133 Fed. 333, s. c. 137 Fed. 616.

⁷ *United States v. Germaine*, 99 U. S. 508, 33 L. ed. 492; *Hendee v. United States*, 22 Court Claims, 134.

§ 747. Formerly R. S. Sec. 5483, 35 Stat. L. 1105.

² *United States v. Mayers*, 81 Fed. 159.

to his own use, or loan with or without interest, or deposit in any place or in any manner, except as authorized by law, any public money intrusted to him; or shall, for any purpose not prescribed by law, withdraw from the Treasurer or any assistant treasurer, or any authorized depository, or transfer, or apply any portion of the public money intrusted to him, shall be deemed guilty of an embezzlement of the money so converted, loaned, deposited, withdrawn, transferred, or applied, and shall be fined not more than the amount embezzled, or imprisoned not more than ten years, or both.¹

The indictment need not state what kind of money was embezzled, whether gold or silver, or bills, or of what denominations.² The statutes of limitations are a bar to an indictment under this section.³ Money appropriated for river and harbor improvements disbursed by an Army officer and the work supervised by the Corps of Engineers of the Army is intended to be protected under this section.⁴ The right to extradition from Canada for an offense under this section discussed.⁵

§ 749. Criminal Code. Sec. 88. Failure of Treasurer, etc., to Safely Keep Public Money.

If the Treasurer of the United States or any assistant treasurer, or any public depository, fails safely to keep all moneys deposited by any disbursing officer or disbursing agent, as well as all moneys deposited by any receiver, collector, or other person having money of the United States, he shall be deemed guilty of embezzlement of the moneys not so safely kept, and shall be fined in a sum equal to the amount of money so embezzled and imprisoned not more than ten years.¹

§ 748. ¹ Formerly R. S. Sec. 5488, 35 Stat. L. 1105.

² *Dimmick v. United States*, 121 Fed. 638, 57 C. C. A. 664 (9th Cir.); citing *United States v. Bornemann*, 36 Fed. 257.

³ *Greene v. United States*, 154 Fed. 401, 85 C. C. A. 251 (5th Cir.).

⁴ *Carter v. McClaughry*, 183 U. S.

365, 46 L. ed. 236, 22 S. C. 181; affirming 105 Fed. 614, s. c. 99 Fed. 948, 40 C. C. A. 199 (2d Cir.), s. c. 97 Fed. 496.

⁵ *Greene v. United States*, 154 Fed. 401, 85 C. C. A. 251 (5th Cir.).

§ 749. ¹ Formerly R. S. Sec. 5489, 35 Stat. L. 1105.

The paymaster of a United States Navy vessel who permits the outer door of his safe to be insecurely closed and removes the lock on the inner door is guilty of embezzlement under this section. The criminal intent, in view of the express terms of the statute, may be implied from the conduct above described.²

§ 750. Criminal Code. Sec. 89. Custodian of Public Money Failing to Safely Keep, etc.

Every officer or other person charged by any Act of Congress with the safe-keeping of the public moneys, who shall loan, use, or convert to his own use, or shall deposit in any bank or exchange for other funds, except as specially allowed by law, any portion of the public moneys intrusted to him for safe-keeping, shall be guilty of embezzlement of the money so loaned, used, converted, deposited, or exchanged, and shall be fined in a sum equal to the amount of money so embezzled and imprisoned not more than ten years.¹

The proof must be clear that the defendant violated some definite provision of the Act in order to sustain an indictment under this section.² This section does not apply to a clerk of a collector of customs,³ nor does it apply to a Clerk of a United States District Court.⁴ But a clerk appointed by an Assistant Treasurer of the United States is an officer of the United States.⁵

§ 751. Criminal Code. Sec. 90. Failure of Officer to Render Accounts, etc.

Every officer or agent of the United States who, having received public money which he is not authorized to retain as salary, pay, or emolument, fails to render his accounts for the same as provided by law shall be deemed guilty of embezzlement, and shall be fined in a sum equal

² Opinion to Secretary of the Navy, 28 Ops. Atty.-Gen. 286.

§ 750. ¹ Formerly R. S. Sec. 5490, 35 Stat. L. 1105.

² *United States v. Forsyth*, 6 McLean, 584, 25 Fed. Cas. No. 15133.

³ *United States v. Smith*, 124 U. S. 525, 31 L. ed. 534, 8 S. C. 595.

⁴ *United States v. Mason*, 218 U. S. 517, 54 L. ed. 1133, 31 S. C. 28, s. c. 177 Fed. 552.

⁵ *United States v. Hartwell*, 6 Wall. (U. S.) 385, 18 L. ed. 830. See, however, *United States v. Greene*, 146 Fed. 778.

to the amount of the money embezzled and imprisoned not more than ten years.¹

§ 752. Criminal Code. Sec. 91. Failure to Deposit as Required.

Whoever, having money of the United States in his possession or under his control, shall fail to deposit it with the Treasurer, or some assistant treasurer, or some public depository of the United States, when required so to do by the Secretary of the Treasury, or the head of any other proper department, or by the accounting officers of the Treasury, shall be deemed guilty of embezzlement thereof, and shall be fined in a sum equal to the amount of money embezzled and imprisoned not more than ten years.¹

An indictment for embezzlement of surplus funds will not lie against a clerk of a Federal district court until he fails or refuses to make the required half yearly return.² The indictment need not state what kind of money was embezzled, whether gold or silver, or bills, nor of what denominations.³ The offense consists, not in the imputed embezzlement of the money, but in the failure to comply with the direction to deposit. It is committed when there is a willful and felonious failure to comply with the specified requirements of the Secretary of the Treasury or the head of the proper department.⁴ The violation of a general regulation requiring deposits to be made is sufficient to constitute a crime.⁵

§ 753. Criminal Code. Sec. 92. Provisions of the Five Preceding Sections, to Whom Applicable.

The provisions of the five preceding sections shall be construed to apply to all persons charged with the safe-keeping, transfer, or disbursement of the public money,

§ 751. ¹ Formerly R. S. Sec. 5491, 35 Stat. L. 1105.

§ 752. ¹ Formerly R. S. Sec. 5492, 35 Stat. L. 1105.

² *United States v. Mason*, 218 U. S. 517, 54 L. ed. 1133, 31 S. C. 28.

³ *Dimmick v. United States*, 121 Fed. 638, 57 C. C. A. 664 (9th Cir.);

citing United States v. Bornemann, 36 Fed. 257.

⁴ *Dimmick v. United States*, 121 Fed. 638, 57 C. C. A. 664 (9th Cir.).

⁵ *Dimmick v. United States*, 121 Fed. 638, 57 C. C. A. 664 (9th Cir.), s. c. 112 Fed. 350.

whether such persons be indicted as receivers or depositaries of the same.¹

§ 754. Criminal Code. Sec. 93. Record Evidence of Embezzlement.

Upon the trial of any indictment against any person for embezzling public money under any provision of the six preceding sections, it shall be sufficient evidence, *prima facie*, for the purpose of showing a balance against such person, to produce a transcript from the books and proceedings of the Treasury, as required in civil cases, under the provisions for the settlement of accounts between the United States and receivers of public money.¹

This section embraces the cases of a deputy Clerk of the District Court of the United States who converts to his own use fees deposited by litigants to secure payment of costs in bankruptcy and other cases.²

§ 755. Criminal Code. Sec. 94. *Prima Facie* Evidence.

The refusal of any person, whether in or out of office, charged with the safe-keeping, transfer, or disbursement of the public money to pay any draft, order, or warrant, drawn upon him by the proper accounting officer of the Treasury, for any public money in his hands belonging to the United States, no matter in what capacity the same may have been received, or may be held, or to transfer or disburse any such money, promptly, upon the legal requirement of any authorized officer, shall be deemed, upon the trial of any indictment against such person for embezzlement, *prima facie* evidence of such embezzlement.¹

It has been held that a certified transcript from the treasury is *prima facie* evidence of embezzlement but it is inadmissible if made up from hearsay.²

§ 753. ¹ Formerly R. S. Sec. 5493, 35 Stat. L. 1105.

§ 754. ¹ Formerly R. S. Sec. 5494, 35 Stat. L. 1105.

² United States v. Davis, 243 U. S. 570.

§ 755.¹ Formerly R. S. Sec. 5495, 35 Stat. L. 1106.

² United States v. Forsyth, 6 McLean, 584, 25 Fed. Cas. No. 15133.

§ 756. Criminal Code. Sec. 95. Evidence of Conversion.

If any officer charged with the disbursement of the public moneys accepts, receives, or transmits to the Treasury Department to be allowed in his favor any receipt or voucher from a creditor of the United States without having paid to such creditor in such funds as the officer received for disbursement, or in such funds as he may be authorized by law to take in exchange, the full amount specified in such receipt or voucher, every such act is an act of conversion by such officer to his own use of the amount specified in such receipt or voucher.¹

§ 757. Criminal Code. Sec. 96. Banker, etc., Receiving Deposit from Disbursing Officer.

Every banker, broker, or other person not an authorized depository of public moneys, who shall knowingly receive from any disbursing officer, or collector of internal revenue, or other agent of the United States, any public money on deposit, or by way of loan or accommodation, with or without interest, or otherwise than in payment of a debt against the United States, or shall use, transfer, convert, appropriate, or apply any portion of the public money for any purpose not prescribed by law; and every president, cashier, teller, director, or other officer of any bank or banking association who shall violate any provision of this section is guilty of embezzlement of the public money so deposited, loaned, transferred, used, converted, appropriated, or applied, and shall be fined not more than the amount embezzled, or imprisoned not more than ten years, or both.¹

A clerk of a District Court is a debtor of the United States as to fees collected by him in excess of the amount allowed him for a compensation by R. S. § 839 and cannot be convicted under this section for failure to turn such surplus over to the United States.² The first clause of this section applies to any person whomsoever.³

§ 756. ¹ Formerly R. S. Sec. 5496, 35 Stat. L. 1106.

§ 757. ¹ Formerly R. S. Sec. 5497, 35 Stat. L. 1106.

² United States v. Mason, 218 U. S. 517, 54 L. ed. 1133, 31 S. C. 28.

³ United States v. Greene, 146 Fed. 778.

§ 758. Criminal Code. Sec. 97. Embezzlement by Internal Revenue Officer, etc.

Any officer connected with, or employed in, the Internal-Revenue Service of the United States, and any assistant of such officer, who shall embezzle or wrongfully convert to his own use any money or other property of the United States, and any officer of the United States, or any assistant of such officer, who shall embezzle or wrongfully convert to his own use any money or property which may have come into his possession or under his control in the execution of such office or employment, or under color or claim of authority as such officer or assistant, whether the same shall be the money or property of the United States or of some other person or party, shall, where the offense is not otherwise punishable by some statute of the United States, be fined not more than the value of the money and property thus embezzled or converted, or imprisoned not more than ten years, or both.¹

The words "and any officer of the United States, or any assistant of such officer" make the statute broad enough to include a deputy clerk of a United States District Court.² And in another case, the court held a clerk of a Federal District Court who had converted unearned amounts of money guilty of embezzlement under this section.³

§ 759. Criminal Code. Sec. 98. Officer Contracting beyond Specific Appropriation.

Whoever, being an officer of the United States, shall knowingly contract for the erection, repair, or furnishing of any public building, or for any public improvement, to pay a larger amount than the specific sum appropriated for such purpose, shall be fined not more than two thousand dollars and imprisoned not more than two years.¹

§ 758. ¹ Formerly R. S. Sec. 5497; 35 Stat. L. 1106.

² *United States v. Davis*, 243 U. S. 570, 61 L. ed. 906, 37 S. C. 442. *See, however, United States v. Mason*, 218 U. S. 517, 54 L. ed. 1133, 31 S. C. 28.

³ *United States v. Dodge*, 251 Fed. 737, 740.

§ 759. ¹ Formerly R. S. Sec. 5503, 35 Stat. L. 1106.

§ 760. Criminal Code. Sec. 99. Officer of United States Failing to Deposit Moneys, etc.

Whoever, being a clerk or other officer of a court of the United States, shall fail forthwith to deposit any money belonging in the registry of the court, or hereafter paid into court or received by the officers thereof, with the Treasurer, assistant treasurer, or a designated depository of the United States, in the name and to the credit of such court, or shall retain or convert to his own use or to the use of another any such money, is guilty of embezzlement, and shall be fined not more than the amount embezzled, or imprisoned not more than ten years, or both; but nothing herein shall be held to prevent the delivery of any such money upon security, according to agreement of parties, under the direction of the court.¹

A clerk of a Court has authority to receive money brought into Court by a private suitor and he is responsible upon his bond if he does not deposit as required by statute and appropriates it to his own use.² It is not a violation of this section for a clerk of a district court to deposit sums of money in a bank other than a designated depository, if the parties to the action formally authorize such deposit.³ A deputy clerk and a clerk of the Federal District Court were held indictable under this section.⁴ This section has been held to include a United States Marshal,⁵ but not a trustee in bankruptcy.⁶

§ 761. Criminal Code. Sec. 100. Receiving Loan or Deposit from Officer of Court.

Whoever shall knowingly receive, from a clerk or other officer of a court of the United States, as a deposit, loan, or otherwise, any money belonging in the registry of such court, is guilty of embezzlement, and shall be punished as prescribed in the preceding section.¹

§ 760. ¹ Formerly R. S. Sec. 5504, 570, 61 L. ed. 906, 37 S. C. 442; 35 Stat. L. 1106. United States v. Dodge, 251 Fed.

² Howard v. United States, 184 737, 740.

U. S. 676, 46 L. ed. 754, 22 S. C. 543. ⁵ Henry v. Sowles, 28 Fed. 481.

³ United States v. Conway Lumber Co., 234 Fed. 961. ⁶ United States v. Bixby, 6 Fed.

⁴ United States v. Davis, 243 U. S. 375. **§ 761.** ¹ Formerly R. S. Sec. 5505, 35 Stat. L. 1107.

§ 762. Criminal Code. Sec. 101. Failure to Make Returns or Reports.

Every officer who neglects or refuses to make any return or report which he is required to make at stated times by any Act of Congress or regulation of the Department of the Treasury, other than his accounts, within the time prescribed by such Act or regulation, shall be fined not more than one thousand dollars.¹

§ 763. Criminal Code. Sec. 102. Aiding in Trading in Obscene Literature.

Whoever, being an officer, agent, or employee of the Government of the United States, shall knowingly aid or abet any person engaged in violating any provision of law prohibiting importing, advertising, dealing in, exhibiting, or sending or receiving by mail, obscene or indecent publications, or representations, or means for preventing conception or producing abortion, or other article of indecent or immoral use or tendency, shall be fined not more than five thousand dollars, or imprisoned not more than ten years, or both.¹

This section relates to publications only; it is not concerned with written communications of a private nature emanating from a single person and exhibiting no purpose of going beyond the one directly addressed.²

§ 764. Criminal Code. Sec. 103. Collecting and Disbursing Officers Forbidden to Trade in Public Property.

Whoever, being an officer of the United States concerned in the collection or the disbursement of the revenues thereof, shall carry on any trade or business in the funds or debts of the United States, or of any State, or in any public property of either, shall be fined not more than three thousand dollars, or imprisoned not more than one year, or both, and be removed from office, and thereafter be incapable of holding any office under the United States.¹

§ 762. ¹ Formerly R. S. Sec. 1780, 35 Stat. L. 1107.

§ 763. ¹ Formerly R. S. Sec. 1875, 35 Stat. L. 1107.

² *Dictum* in *United States v. Williams*, 3 Fed. 484.

§ 764. ¹ Formerly R. S. Sec. 1788, 1789, 35 Stat. L. 1107.

§ 765. Criminal Code. Sec. 104. Certain Officers Forbidden to Purchase, etc., Witness, etc., Fees.

Whoever, being a judge, clerk, or deputy clerk of any court of the United States, or of any territory thereof, or a United States district attorney, assistant attorney, marshal, deputy marshal, commissioner, or other person holding any office or employment, or position of trust or profit under the Government of the United States shall, either directly or indirectly, purchase at less than the full face value thereof, any claim against the United States for the fee, mileage, or expenses of any witness, juror, deputy marshal, or any other officer of the court whatsoever, shall be fined not more than one thousand dollars.¹

§ 766. Criminal Code. Sec. 105. Falsely Certifying, etc., as to Record of Deeds, etc.

Whoever, being an officer or other person authorized by any law of the United States to record a conveyance of real property or any other instrument which by such law may be recorded, shall knowingly certify falsely that such conveyance or instrument has or has not been recorded, shall be fined not more than one thousand dollars, or imprisoned not more than seven years, or both.¹

§ 767. Criminal Code. Sec. 106. Other False Certificates.

Whoever, being a public officer or other person authorized by any law of the United States to make or give a certificate or other writing, shall knowingly make and deliver as true such a certificate or writing, containing any statement which he knows to be false, in a case where the punishment thereof is not elsewhere expressly provided by law, shall be fined not more than five hundred dollars, or imprisoned not more than one year, or both.¹

§ 768. Criminal Code. Sec. 107. Inspector of Steamboats Receiving Illegal Fees.

Every inspector of steamboats who, upon any pretense, receives any fee or reward for his services, except what is allowed to him by law, shall forfeit his office, and be fined

§ 765. ¹ 35 Stat. L. 1107.

§ 767. ¹ 35 Stat. L. 1107.

§ 766. ¹ 35 Stat. L. 1107.

not more than five hundred dollars, or imprisoned not more than six months, or both.¹

§ 769. Criminal Code. Sec. 108. Pension Agent Taking Fee, etc.

Every pension agent, or other person employed or appointed by him, who takes, receives, or demands any fee or reward from any pensioner for any service in connection with the payment of his pension, shall be fined not more than five hundred dollars.¹

§ 770. Criminal Code. Sec. 109. Officer Not to Be Interested in Claims against the United States.

Whoever, being an officer of the United States, or a person holding any place of trust or profit, or discharging any official function under, or in connection with, any Executive Department of the Government of the United States, or under the Senate or House of Representatives of the United States, shall act as an agent or attorney for prosecuting any claim against the United States, or in any manner, or by any means, otherwise than in discharge of his proper official duties, shall aid or assist in the prosecution or support of any such claim, or receive any gratuity, or any share of our interest in any claim from any claimant against the United States, with intent to aid or assist, or in consideration of having aided or assisted, in the prosecution of such claim, shall be fined not more than five thousand dollars, or imprisoned not more than one year, or both.¹

A retired Army officer is such an "officer of the United States."² But an assistant attorney of the District of Columbia does not come within the statute.³

§ 771. Criminal Code. Sec. 110. Member of Congress, etc., Soliciting or Accepting Bribe, etc.

Whoever, being elected or appointed a Member of or Delegate to Congress, or a Resident Commissioner, shall,

§ 768. ¹ Formerly R. S. Sec. 5482, 35 Stat. L. 1107.

§ 769. ¹ Formerly R. S. Sec. 5487, 35 Stat. L. 1107.

§ 770. ¹ Formerly R. S. Sec. 5498, 35 Stat. L. 1107.

² In re Winthrop, 31 Court Claims, 35, following Tyler's Case, 18 Court Claims, 25.

³ 18 Opinions Attorney-General, 161; United States v. Germaine, 99 U. S. 508, 25 L. ed. 482.

after his election or appointment and either before or after he has qualified, and during his continuance in office, directly or indirectly, ask, accept, receive, or agree to receive, any money, property, or other valuable consideration, or any promise, contract, undertaking, obligation, gratuity, or security for the payment of money or for the delivery or conveyance of anything of value to him or to any person with his consent, connivance, or concurrence, for his attention to, or services, or with the intent to have his action, vote, or decision influenced, on any question, matter, cause, or proceeding, which may at any time be pending in either House of Congress or before any committee thereof, or which by law or under the Constitution may be brought before him in his official capacity, or in his place as such Member, Delegate, or Resident Commissioner, shall be fined not more than three times the amount asked, accepted, or received, and imprisoned not more than three years; and shall, moreover, forfeit his office or place, and thereafter be forever disqualified from holding any office of honor, trust, or profit under the Government of the United States.¹

To merely charge in an indictment under the conspiracy statute that the defendants conspired to commit the crime denounced by this section is probably defective.² A non-negotiable promissory note is not property or money within the meaning of the statute.³ Before one can become a "Member of Congress" within the meaning of this section, he must be accepted by the House or Senate as such.⁴ Under this section, a clerk in one of the departments can be indicted as he is an "officer and clerk" or "officer and agent."⁵

§ 772. Criminal Code. Sec. 111. Offering, etc., Member of Congress, Bribe, etc.

Whoever shall promise, offer, or give, or cause to be promised, offered, or given, any money or other thing of

¹ § 771. Formerly R. S. Sec. 1781, 35 Stat. L. 1108.

² United States v. Dietrich, 126 Fed. 664.

³ United States v. Driggs, 125 Fed. 520.

⁴ United States v. Dietrich, 126 Fed. 676.

⁵ McGregor v. United States, 134 Fed. 187, 69 C. C. A. 477 (4th Cir.).

value, or shall make or tender any contract, undertaking, obligation, gratuity, or security for the payment of money or for the delivery or conveyance of anything of value, to any Member of either House of Congress, or Delegate to Congress, or Resident Commissioner, after his election or appointment and either before or after he has qualified and during his continuance in office, or to any person with his consent, connivance, or concurrence, with intent to influence his action, vote, or decision, on any question, matter, cause, or proceeding which may at any time be pending in either House of Congress, or before any committee thereof, or which by law or under the Constitution may be brought before him in his official capacity or in his place as such Member, Delegate, or Resident Commissioner, shall be fined not more than three times the amount of money or value of the thing so promised, offered, given, made, or tendered, and imprisoned not more than three years.¹

This section was recently amended by adding the following provisions :

Hereafter no part of the money appropriated by this or any other Act shall, in the absence of express authorization by Congress, be used directly or indirectly to pay for any personal service, advertisement, telegram, telephone, letter, printed or written matter, or other device, intended or designed to influence in any manner a Member of Congress, to favor or oppose, by vote or otherwise, any legislation or appropriation by Congress, whether before or after the introduction of any bill or resolution proposing such legislation or appropriation ; but this shall not prevent officers and employees of the United States from communicating to Members of Congress on the request of any Member or to Congress, through the proper official channels, requests for legislation or appropriations which they deem necessary for the efficient conduct of the public business. Any officer or employee of the United States who, after notice and hearing by the superior officer vested with the power of removing him, is found to have violated or attempted to violate this section, shall be removed by

§ 772. ¹ Formerly R. S. Sec. 5450, 35 Stat. L. 1108.

such superior officer from office or employment. Any officer or employee of the United States who violates or attempts to violate this section shall also be guilty of a misdemeanor and on conviction thereof shall be punished by a fine of not more than \$500, or by imprisonment for not more than one year, or both.”²

§ 773. Criminal Code. Sec. 112. Member of Congress Taking Consideration for Procuring Contract, Office, etc.; Offering Member Consideration, etc.

Whoever, being elected or appointed a Member of or Delegate to Congress, or a Resident Commissioner, shall, after his election or appointment and either before or after he has qualified, and during his continuance in office, or being an officer or agent of the United States, shall directly or indirectly take, receive, or agree to receive, from any person, any money, property, or other valuable consideration whatever, for procuring, or aiding to procure, any contract, appointive office, or place, from the United States or from any officer or department thereof, for any person whatever, or for giving any such contract, appointive office, or place to any person whomsoever; or whoever, directly or indirectly, shall offer, or agree to give, or shall give, or bestow, any money, property, or other valuable consideration whatever, for the procuring, or aiding to procure, any such contract, appointive office, or place, shall be fined not more than ten thousand dollars and imprisoned not more than two years; and shall, moreover, be disqualified from holding any office of honor, profit, or trust under the Government of the United States. Any such contract or agreement may, at the option of the President, be declared void.¹

A non-negotiable promissory note is not money, property, or a valuable consideration within the meaning of the act.² “Any officer is expressly included, and forbidden to do those things which are made unlawful by the comprehensive language of the

² Act of July 11, 1919, c. 6, § 6.

¹ United States v. Driggs, 125

§ 773. ¹ Formerly R. S. Sec. 1781, Fed. 520.

35 Stat. L. 1108.

law. Congress proceeded evidently in recognition of the principle that 'No man can serve two masters.' . . ."³ A member of Congress who in consideration of a sum of money agrees to aid a person in being appointed postmaster commits the crime denounced by this section.⁴

§ 774. Criminal Code. Sec. 113. Member of Congress, etc., Taking Compensation in Matters to Which United States Is a Party.

Whoever, being elected or appointed a Senator, Member of or Delegate to Congress, or a Resident Commissioner, shall, after his election or appointment and either before or after he has qualified, and during his continuance in office, or being the head of a department, or other officer or clerk in the employ of the United States, shall, directly or indirectly, receive, or agree to receive, any compensation whatever for any services rendered or to be rendered to any person, either by himself or another, in relation to any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter or thing in which the United States is a party or directly or indirectly interested, before any department, court-martial, bureau, officer, or any civil, military, or naval commission whatever, shall be fined not more than ten thousand dollars and imprisoned not more than two years; and shall, moreover, thereafter be incapable of holding any office of honor, trust, or profit under the Government of the United States.¹

The constitutionality of this section has been upheld.² It is proper to allege in an indictment under separate counts, the charge of a conspiracy to defraud the United States, and also a violation of R. S. 1781 and 1782 by receiving money from their alleged co-conspirator for procuring, or aiding to procure, a contract mentioned in the counts relating to the conspiracy.³

³ Per Hunt, D. J., in *United States v. Booth*, 148 Fed. 112.

⁴ *United States v. Dietrich*, 126 Fed. 664.

§ 774. ¹ Formerly R. S. Sec. 1782, 35 Stat. L. 1109.

² *Burton v. United States*, 202 U. S. 344, 50 L. ed. 1057, 26 S. C. 688.

³ *McGregor v. United States*, 134 Fed. 187, 69 C. C. A. 477 (4th Cir.).

A United States Senator may not receive compensation for appearing before the Post-Office Department or the Postmaster General on a hearing held by the latter regarding the right of a person to use the mails of the United States. The charge against such person was that he was using the mails to further an illegal and fraudulent scheme.⁴ The consummation of the conspiracy need not result in a pecuniary loss to hold the conspirators under this section. The language of the statute clearly contemplates that the loss or damage may be other than a pecuniary one susceptible of accurate calculation.⁵ A special agent of the Land Department is not an officer of the United States.⁶ But the receiver of a national bank is such an officer.⁷ The last clause of this section declaring that a person convicted under it shall be incapable of holding any office of honor, trust, or profit under the Government of the United States, did not apply to United States Senators elected by the State, the reason being that they were holding positions of trust under the State legislatures.⁸ The Panama Railroad Company, a New York corporation, whose capital stock is owned entirely by the United States is not a Government Department. Therefore, an agreement made with the head of the commissary department of that railroad whereby he was to share in the profits of certain contracts made with that railroad is not a crime.⁹ An application for the purchase of land from the Government under the Timber and Stone Act is, in effect, the inauguration of a proceeding in which the Government is an interested party. Where, therefore, a clerk in the Land Office rendered services for a consideration to an applicant, he is guilty of a violation of this section.¹⁰ A non-negotiable promissory note is not anything of value and the receipt of such note for procuring a contract from the Government is not a crime, as no compensation is received by the

⁴ *Burton v. United States*, 202 U. S. 344, 50 L. ed. 1057, 26 S. C. 688.

⁵ *McGregor v. United States*, 134 Fed. 187, 69 C. C. A. 477 (4th Cir.).

⁶ *United States v. Schlierholz*, 137 Fed. 616.

⁷ *Platt v. Beach*, 2 Ben. 303, 19 Fed. Cas. No. 11215.

⁸ *Burton v. United States*, 202 U. S. 344, 50 L. ed. 1057, 26 S. C. 688.

⁹ *Salas v. United States*, 234 Fed. 842, 148 C. C. A. 440 (2d Cir.).

¹⁰ *United States v. Long*, 184 Fed. 184; *United States v. Booth*, 148 Fed. 112.

accused.¹¹ The defendant being convicted of a violation of this section gave a supersedeas bond and appealed to the Supreme Court. While the appeal was pending he died. The question arose whether his estate was liable for the fine imposed as part of the sentence. It was held that the statute was wholly penal and that his estate was not liable for the fine.¹² The crime is committed in the district where the minds of the parties meet or where the actual payment of the remuneration occurs.¹³ Where the indictment alleges that the defendant, a United States Senator, was paid by check in St. Louis, and the proof shows clearly that the check was mailed in St. Louis and addressed to the defendant in Washington, D. C., where he received it and deposited it at his bank at that place, in the ordinary course of business, it was held to be an error to submit to the jury the question whether the payment took place in Washington or St. Louis, because, as matter of law, the payment was made in Washington and the Court should have directed a verdict of not guilty.¹⁴

§ 775. Criminal Code. Sec. 114. Member of Congress Not to Be Interested in Contract.

Whoever, being elected or appointed a Member of or Delegate to Congress or a Resident Commissioner, shall, after his election or appointment and either before or after he has qualified, and during his continuance in office, directly or indirectly, himself, or by any other person in trust for him, or for his use or benefit, or on his account, undertake, execute, hold, or enjoy, in whole or in part, any contract or agreement, made or entered into in behalf of the United States by any officer or person authorized to make contracts on its behalf, shall be fined not more than three thousand dollars. All contracts or agreements made in violation of this section shall be void; and whenever any sum of money is advanced by the United States, in consideration of any such contract or agreement, it shall forthwith be repaid; and in case of failure or refusal to repay the same when

¹¹ United States v. Driggs, 125 Fed. 520.

¹² United States v. Dunne, 173 Fed. 254, 97 C. C. A. 420 (9th Cir.), s. c. 163 Fed. 1014.

¹³ Burton v. United States, 202 U. S. 344, 50 L. ed. 1057, 26 S. C. 688.

¹⁴ Burton v. United States, 196 U. S. 283, 49 L. ed. 482, 25 S. C. 243.

demanding by the proper officer of the department under whose authority such contract or agreement shall have been made or entered into, suit shall at once be brought against the person so failing or refusing and his sureties, for the recovery of the money so advanced.¹

The statute "plainly includes" any contract or agreement, "no matter how fairly obtained or held, how reasonable in its terms, or how advantageous to the United States. The inhibition is not alone against undertaking or executing — that is, making or entering into such a contract or agreement, but also against holding or enjoying one — that is, having or retaining the title thereto or receiving the benefits therefrom."²

§ 776. Criminal Code. Sec. 115. Officer Making Contracts with Member of Congress.

Whoever, being an officer of the United States, shall, on behalf of the United States, directly or indirectly make or enter into any contract, bargain, or agreement, in writing or otherwise, with any Member of or Delegate to Congress, or any Resident Commissioner, after his election or appointment as such Member, Delegate, or Resident Commissioner, and either before or after he has qualified, and during his continuance in office, shall be fined not more than three thousand dollars.¹

§ 777. Criminal Code. Sec. 116. Contracts to Which Two Preceding Sections Do Not Apply.

Nothing contained in the two preceding sections shall extend, or be construed to extend, to any contract or agreement made or entered into, or accepted, by any incorporated company, where such contract or agreement is made for the general benefit of such incorporation or company; nor to the purchase or sale of bills of exchange or other property by any Member of or Delegate to Congress, or Resident Commissioner, where the same are ready for

§ 775. ¹ Formerly R. S. Sec. 3739, 35 Stat. L. 1109.

² Per Van Devanter, C. J., in *United States v. Dietrich*, 126 Fed. 671, 673.

§ 776. ¹ Formerly R. S. Sec. 3742, 35 Stat. L. 1109.

delivery, and payment therefor is made, at the time of making or entering into the contract or agreement.¹

§ 778. Criminal Code. Sec. 117. United States Officer Accepting Bribe.

Whoever, being an officer of the United States, or a person acting for or on behalf of the United States, in any official capacity, under or by virtue of the authority of any department or office of the Government thereof; or whoever, being an officer or person acting for or on behalf of either House of Congress, or of any committee of either House, or of both Houses thereof, shall ask, accept, or receive any money, or any contract, promise, undertaking, obligation, gratuity, or security for the payment of money, or for the delivery or conveyance of anything of value, with intent to have his decision or action on any question, matter, cause, or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, influenced thereby, shall be fined not more than three times the amount of money or value of the thing so asked, accepted, or received, and imprisoned not more than three years; and shall, moreover, forfeit his office or place and thereafter be forever disqualified from holding any office of honor, trust, or profit under the Government of the United States.¹

In an indictment charging bribery regarding certain leases which the defendant was charged with the duty of executing, the leases need not be described with particularity. It is sufficient to describe the land and to give the names of the persons offering the bribes.² The indictment should state the authority of the officer to act in relation to subject matter in which he was about to be bribed.³ The indictment need not charge or very accurately describe the official capacity of the defendant if from the other allegations in the indictment his official capacity is made

§ 777. ¹ Formerly R. S. Sec. 3740, 35 Stat. L. 1109.

§ 778. ¹ Formerly R. S. Sec. 5501, 5502, 35 Stat. L. 1109.

² *Sharp v. United States*, 138 Fed. 878, 71 C. C. A. 258 (8th Cir.).

³ *United States v. Reichert*, 32 Fed. 142.

apparent.⁴ An indictment which alleges that the defendant asked a gratuity, the nature of which is to the Grand Jury unknown, is defective.⁵

On the trial of an indictment under this section, it is admissible on cross-examination to ask of the complaining witness (who was the contractor) what arrangement he has made with the Government agents for immunity.⁶ In commenting on the legal capacity of an Indian Agent to execute leases of Indian country it is said: "The fact that the lands could and probably would be leased in such quantities and on such terms as this agent recommended made him such a factor in the execution of the leases as to charge him with an official trust 'in the execution and completion of (the) certain leases.' " ⁷ A member of a medical board of examiners appointed by the Pension Commissioner while not an officer of the United States, nevertheless, is a person acting for the United States, and is therefore amenable to this section.⁸ An "officer of the United States" under this section is one who is appointed by the President, or by the President with the advice and consent of the Senate; hence, a special officer appointed by the Commissioner of Indian Affairs to suppress liquor traffic is not such an officer.⁹ Every action that is within the range of official duty comes within the purview of this section.¹⁰ Special officers appointed by the Commissioner of Indian Affairs to aid in the suppression of liquor traffic, whose duty it is to investigate applications for clemency, are prohibited from accepting fees from those whose cases they are investigating.¹¹ "In the bribery statute we find the word 'influence' used; it being essential that the consideration shall have been received with the purpose on the part of the officer to have his action or decision influenced thereby. It does not always follow, however, that the mere

⁴ *King v. United States*, 112 Fed. 988, 50 C. C. A. 647 (5th Cir.).

⁵ *United States v. Kessel*, 62 Fed. 57.

⁶ *King v. United States*, 112 Fed. 988, 50 C. C. A. 647 (5th Cir.).

⁷ *Sharp v. United States*, 138 Fed. 878, 881, 71 C. C. A. 258 (8th Cir.).

⁸ *United States v. Van Leuven*, 62 Fed. 62.

⁹ *United States v. Van Wert*, 195 Fed. 974.

¹⁰ *United States v. Birdsall*, 233 U. S. 223, 58 L. ed. 930, 34 S. C. 512.

¹¹ *United States v. Birdsall*, 233 U. S. 223, 58 L. ed. 930, 34 S. C. 512. *Reversing* 206 Fed. 818, 195 Fed. 974.

acceptance by an officer of compensation or gratuity for doing a service which he intends to, and ought by law to do, in a matter in his own office, carries with it an intent on his part that his action in such matter shall be influenced thereby.”¹²

§ 779. Criminal Code. Sec. 118. Political Contributions Not to Be Solicited by Certain Officers.

No Senator or Representative in, or Delegate or Resident Commissioner to Congress, or Senator, Representative, Delegate, or Resident Commissioner elect, or officer or employee of either House of Congress, and no executive, judicial, military, or naval officer of the United States, and no clerk or employee of any department, branch, or bureau of the executive, judicial, or military or naval service of the United States, shall, directly or indirectly, solicit or receive, or be in any manner concerned in soliciting or receiving, any assessment, subscription, or contribution for any political purpose whatever, from any officer, clerk, or employee of the United States, or any department, branch, or bureau thereof, or from any person receiving any salary or compensation from moneys derived from the Treasury of the United States.¹

The constitutionality of this section has been upheld.² In one case, an indictment under this section was examined and held to be sufficient.³ There is a fatal variance between the indictment and the proof where the indictment alleges that the names of the employees from whom the assessments were received were unknown to the Grand Jury. The proof showed that the defendant received these assessments from one of his confederates who in fact did the collecting from the employees; and that the names of these were known to the Grand Jury.⁴

§ 780. Criminal Code. Sec. 119. Political Contributions Not to Be Received in Public Offices.

No person shall, in any room or building occupied in the discharge of official duties by any officer or employee

¹² Per Hunt, D. J., in *United States v. Booth*, 148 Fed. 112.

³ *United States v. Scott*, 74 Fed. 213.

§ 779. ¹ 35 Stat. L. 1110.

⁴ *United States v. Riley*, 74 Fed. 210.

² *United States v. Curtis*, 12 Fed.

of the United States mentioned in the preceding section, or in any navy-yard, fort, or arsenal, solicit in any manner whatever or receive any contribution of money or other thing of value for any political purpose whatever.¹

Delivering a letter to a postmaster in the post office, which said letter contains a request for a political contribution is a crime.² When a letter soliciting a political contribution is mailed to a clerk of a United States post office which he receives and reads in that building, the crime denounced by this section is committed. The defendant may not be physically within the building, yet, under the circumstances, the crime is committed therein.³

§ 781. Criminal Code. Sec. 120. Immunity from Official Proscription.

No officer or employee of the United States mentioned in section one hundred and eighteen shall discharge, or promote, or degrade, or in any manner change the official rank or compensation of any other officer or employee, or promise or threaten so to do, for giving or withholding or neglecting to make any contribution of money or other valuable thing for any political purpose.¹

§ 782. Criminal Code. Sec. 121. Giving Money to Officials for Political Purposes Prohibited.

No officer, clerk, or other person in the service of the United States shall, directly or indirectly, give or hand over to any other officer, clerk, or person in the service of the United States, or to any Senator or Member of or Delegate to Congress, or Resident Commissioner, any money or other valuable thing on account of or to be applied to the promotion of any political object whatever.¹

§ 783. Criminal Code. Sec. 122. Penalty for Violating Provisions of Four Preceding Sections.

Whoever shall violate any provision of the four preceding sections shall be fined not more than five thousand dollars, or imprisoned not more than three years, or both.¹

§ 780. ¹ 35 Stat. L. 1110.

U. S. 39, 52 L. ed. 673, 28 S. C. 426.

² United States v. Smith, 163 Fed.

§ 781. ¹ 35 Stat. L. 1110.

926.

§ 782. ¹ 35 Stat. L. 1110.

³ United States v. Thayer, 209

§ 783. ¹ 35 Stat. L. 1110.

§ 784. Criminal Code. Sec. 123. Government Officer, etc., Giving Out Advance Information Respecting Crop Reports.

Whoever, being an officer or employee of the United States or a person acting for or on behalf of the United States in any capacity under or by virtue of the authority of any department or office thereof, and while holding such office, employment, or position shall, by virtue of the office, employment, or position held by him, become possessed of any information which might exert an influence upon or affect the market value of any product of the soil grown within the United States, which information is by law or by the rules of the department or office required to be withheld from publication until a fixed time, and shall willfully impart, directly or indirectly, such information, or any part thereof, to any person not entitled under the law or the rules of the department or office to receive the same; or shall, before such information is made public through regular official channels, directly or indirectly speculate in any such product respecting which he has thus become possessed of such information, by buying or selling the same in any quantity, shall be fined not more than ten thousand dollars, or imprisoned not more than ten years, or both: *Provided*, That no person shall be deemed guilty of a violation of any such rule, unless prior to such alleged violation he shall have had actual knowledge thereof.¹

Unless made so by law, a clerk of a department of the Government does not commit a crime in giving out information which was understood to be kept secret.²

§ 785. Criminal Code. Sec. 124. Government Officer, etc., Knowingly Compiling or Issuing False Statistics Respecting Crops.

Whoever, being an officer or employee of the United States and whose duties require the compilation or report of statistics or information relative to the products of the soil, shall knowingly compile for issuance, or issue, any false statistics or information as a report of the United States, shall be fined not more than five thousand dollars, or imprisoned not more than five years, or both.¹

§ 784. ¹ 35 Stat. L. 1110.

§ 785. ¹ 35 Stat. L. 1111.

² United States v. Haas, 167 Fed. 211.

CHAPTER LI

CRIMINAL CODE, CHAPTER SIX

OFFENSES AGAINST PUBLIC JUSTICE

- § 786. Crim. Code § 125. Perjury.
- § 787. Crim. Code § 126. Subornation of Perjury.
- § 788. Crim. Code § 127. Stealing or Altering Process; Procuring False Bail, etc.
- § 789. Crim. Code § 128. Destroying, etc., Public Records.
- § 790. Crim. Code § 129. Destroying Records by Officer in Charge.
- § 791. Crim. Code § 130. Forging Signature of Judge, etc.
- § 792. Crim. Code § 131. Bribery of a Judge or Judicial Officer.
- § 793. Crim. Code § 132. Judge or Judicial Officer Accepting a Bribe, etc.
- § 794. Crim. Code § 133. Juror, Referee, Master, etc., or Judicial Officer, etc., Accepting a Bribe.
- § 795. Crim. Code § 134. Witness Accepting Bribe.
- § 796. Crim. Code § 135. Intimidation or Corruption of Witness or Grand or Petit Juror, or Officer.
- § 797. Crim. Code § 136. Conspiring to Intimidate Party, Witness, or Juror.
- § 798. Crim. Code § 137. Attempt to Influence Juror.
- § 799. Crim. Code § 138. Allowing Prisoner to Escape.
- § 800. Crim. Code § 139. Application of Preceding Section.
- § 801. Crim. Code § 140. Obstructing Process or Assaulting an Officer.
- § 802. Crim. Code § 141. Rescuing, etc., Prisoner, Concealing, etc., Person for Whom Warrant Has Issued.
- § 803. Crim. Code § 142. Rescue at Execution.
- § 804. Crim. Code § 143. Rescue of Prisoner.
- § 805. Crim. Code § 144. Rescue of Body of Executed Offender.
- § 806. Crim. Code § 145. Extortion by Informer.
- § 807. Crim. Code § 146. Misprision of Felony.

§ 786. Criminal Code. Sec. 125. Perjury.

Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered,

that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, shall willfully and contrary to such oath state or subscribe any material matter which he does not believe to be true, is guilty of perjury, and shall be fined not more than two thousand dollars and imprisoned not more than five years.¹

Under this section it is sufficient to allege in an indictment the substance of the offense and not the details. General averments of materiality are sufficient.² However, the indictment must be sufficiently specific to apprise the accused of the specific charge against him and to inform the court of the substantive facts relied upon for conviction.³ An indictment charging the defendant with perjury in omitting certain property from his schedules of assets is insufficient if it does not allege what property the defendant omitted from the schedules and that he actually owned such property.⁴ Under this section there is no crime committed unless the false swearing was with reference to material matter.⁵

The following provision of the United States Revised Statutes and the annotations thereto are part of the law controlling the crime of perjury:

In every presentment or indictment prosecuted against any such person for perjury, it shall be sufficient to set forth the substance of the offense charged upon the defendant, and by what court, and before whom the oath was taken, averring such court or person to have competent authority to administer the same, together with the proper averment to falsify the matter wherein the perjury is assigned, without setting forth the bill, answer, information, indictment, declaration, or any part of any record or

§ 786. ¹ Formerly R. S. Sec. 5392, 35 Stat. L. 1111.

² *Markham v. United States*, 160 U. S. 319, 40 L. ed. 441, 16 S. C. 288; *Baskin v. United States*, 209 Fed. 740, 126 C. C. A. 464 (7th Cir.); *Noah v. United States*, 128 Fed. 270, 62 C. C. A. 618 (9th Cir.).

³ *Collins v. United States*, 253 Fed. 609, — C. C. A. — (9th Cir.).

⁴ *Bartlett v. United States*, 106 Fed. 884, 46 C. C. A. 19 (9th Cir.).

⁵ *United States v. Landsberg*, 23 Fed. 585; *United States v. Shinn*, 14 Fed. 447; *United States v. Hampton*, 101 Fed. 714, 41 C. C. A. 625 (4th Cir.).

proceeding, either in law or equity, or any affidavit, deposition or certificate, other than as hereinbefore stated, and without setting forth the commission or authority of the court or person before whom the perjury was committed.⁶

Perjury in bankruptcy proceedings is covered in this section despite the reading of Section 29 *b* (2) of the Bankruptcy Act which is construed specifically.⁷

The following provision of the U. S. Revised Statutes is part of the law controlling in perjury cases :

In prosecutions for perjury committed on examination before a naval general court-martial, or for the subornation thereof, it shall be sufficient to set forth the offense charged on the defendant, without setting forth the authority by which the court was held, or the particular matters brought before, or intended to be brought before, said court.⁸

The making of a false affidavit, material to the issue in a proceeding pending in the Land Department, constitutes perjury within the meaning of the section.⁹ But the making of a false affidavit is not perjury at common law when not made in a judicial proceeding or Court of Justice.¹⁰ However, a person making a false affidavit for a selective service board is guilty of perjury under this section.¹¹ Making false statements in an application required by the Civil Service Commission is within the statute.¹² Perjurious statements made before a United

⁶ R. S. § 5396.

⁷ *Epstein v. United States*, 196 Fed. 354, 116 C. C. A. 174 (7th Cir.); *United States v. Coyle*, 229 Fed. 256; *Ulmer v. United States*, 219 Fed. 641, 134 C. C. A. 127 (6th Cir.); *Kahn v. United States*, 214 Fed. 54, 130 C. C. A. 494 (2d Cir.); *United States v. Rhodes*, 212 Fed. 518; *Daniels v. United States*, 196 Fed. 459, 116 C. C. A. 233 (6th Cir.); *Baskin v. United States*, 209 Fed. 740, 126 C. C. A. 464 (7th Cir.); *Kovoloff v. United States*, 202 Fed. 475, 120 C. C. A. 605 (7th Cir.); *Bartlett v.*

United States, 106 Fed. 884, 46 C. C. A. 19 (9th Cir.).

⁸ R. S. § 1023.

⁹ *United States v. Smull*, 236 U. S. 405, 59 L. ed. 641, 35 S. C. 349; *United States v. Crandol*, 233 Fed. 331; *United States v. Morehead*, 243 U. S. 607, 61 L. ed. 926, 37 S. C. 458.

¹⁰ *Wechsler v. United States*, 158 Fed. 579, 581, 86 C. C. A. 37 (2d Cir.).

¹¹ *United States v. Miller*, 249 Fed. 985.

¹² *United States v. Crandol*, 233 Fed. 331.

States Commissioner conducting a preliminary hearing are included in this section.¹³ But making perjurious statements to a department of the government in the enforcement of rules promulgated by the President which however do not require an oath, is not within this section.¹⁴

§ 787. Criminal Code. Sec. 126. Subordination of Perjury.

Whoever shall procure another to commit any perjury is guilty of subornation of perjury, and punishable as in the preceding section prescribed.¹

The following provision of the United States Revised Statutes is part of the law controlling the crime of subornation of perjury:

“In every presentment or indictment for subornation of perjury, it shall be sufficient to set forth the substance of the offense charged upon the defendant, without setting forth the bill, answer, information, indictment, declaration, or any part of any record or proceeding either in law or equity, or any affidavit, deposition or certificate, and without setting forth the commission or authority of the court or person before whom the perjury was committed, or was agreed or promised to be committed.”²

An indictment charging subornation of perjury committed before a Grand Jury need not state the particular matter under investigation by the Grand Jury.³ An indictment which charges “that on the —— day of December, 1893, the said G. F. B. Howard, upon the said trial, did unlawfully procure,” etc., is not fatally defective.⁴ Procuring the making of false affidavits by claimants to public lands is subornation of perjury.⁵ Suborning a witness

¹³ *Safford v. United States*, 252 Fed. 471, 164 C. C. A. 655 (2d Cir.).

¹⁴ *United States v. Robertson*, 257 Fed. 195.

§ 787. ¹ Formerly R. S. Sec. 5393, 35 Stat. L. 1111.

² Revised Statute § 5397.

³ *Hendricks v. United States*, 223 U. S. 178, 56 L. ed. 394, 32 S. C. 313.

⁴ *United States v. Howard*, 132

Fed. 325. See, however, *United States v. Law*, 50 Fed. 915.

⁵ *Nickell v. United States*, 161 Fed. 702, 88 C. C. A. 562 (9th Cir.); *United States v. Morehead*, 243 U. S. 607, 61 L. ed. 926, 37 S. C. 458; *Babcock v. United States*, 34 Fed. 873; *Hallock v. United States*, 185 Fed. 417, 107 C. C. A. 487 (8th Cir.); *Nurnberger v. United States*, 156 Fed. 721, 84 C. C. A. 377 (8th Cir.).

in a bankruptcy proceeding is punishable under this section.⁶ Corroboration of the testimony of a single witness appears not to be essential in an indictment for subornation of perjury.⁷ The person who is solicited to commit perjury is not an accomplice in the crime of subornation of perjury, and, therefore, a conviction on his testimony will be upheld.⁸ Even though the officials were not authorized to take oaths in the particular proceeding, it is sufficient if they were proper officials to administer oaths in pursuance to a valid regulation of a Federal Department.⁹ Agreeing together to instigate and hire persons to commit perjury is a violation of the statute.¹⁰ Where the receiver in bankruptcy forcibly ejected the defendant who had possession of premises and a stock of goods deeded to him by the bankrupt four days before the petition in bankruptcy was filed, and on the hearing of this petition where witnesses swore falsely at the instigation of defendant, that a full cash consideration passed from the petitioner to the bankrupt at the time of sale, the court held that as the receiver should have brought a plenary action to obtain the goods instead of proceeding by summary process the defendant's petition should have been granted in any event and the false evidence was wholly immaterial. The convictions were, therefore, reversed.¹¹

§ 788. Criminal Code. Sec. 127. Stealing or Altering Process; Procuring False Bail, etc.

Whoever shall feloniously steal, take away, alter, falsify, or otherwise avoid any record, writ, process, or other proceeding, in any court of the United States, by means whereof any judgment is reversed, made void, or does not take effect; or whoever shall acknowledge, or procure to be acknowledge, in any such court, any recognizance, bail or judgment, in the name of any other person not privy or consenting to the same, shall be fined not more

⁶ *Epstein v. United States*, 196 Fed. 354, 116 C. C. A. 174 (7th Cir.).

⁷ *Boren v. United States*, 144 Fed. 801, 75 C. C. A. 531 (9th Cir.).

⁸ *United States v. Thompson*, 31 Fed. 331.

⁹ *United States v. Morehead*, 243

U. S. 607, 61 L. ed. 927, 37 S. C. 458.

¹⁰ *United States v. Richards*, 149 Fed. 443. See also Section 37 of the Federal Penal Code, *ante*.

¹¹ *Morris v. United States* (C. C. A. 7th Cir.), Decided March 4th, 1919.

than five thousand dollars, or imprisoned not more than seven years, or both; but this provision shall not extend to the acknowledgment of any judgment by an attorney, duly admitted, for any person against whom such judgment is had or given.¹

§ 789. Criminal Code. Sec. 128. Destroying, etc., Public Records.

Whoever shall willfully and unlawfully conceal, remove, mutilate, obliterate, or destroy, or attempt to conceal, remove, mutilate, obliterate, or destroy, or, with intent to conceal, remove, mutilate, obliterate, destroy, or steal, shall take and carry away any record, proceeding, map, book, paper, document, or other thing, filed or deposited with any clerk or officer of any court of the United States, or in any public office, or with any judicial or public officer of the United States, shall be fined not more than two thousand dollars, or imprisoned not more than three years, or both.¹

The word "record" as used here does not apply to a formal record but is used in its ordinary and common meaning.² The specific intent to destroy must be present and the records may be taken from any place whatsoever.³ Removing and destroying an original affidavit in naturalization proceedings on file with the clerk is prohibited by this section.⁴

§ 790. Criminal Code. Sec. 129. Destroying Records by Officer in Charge.

Whoever, having the custody of any record, proceeding, map, book, document, paper, or other thing specified in the preceding section, shall willfully and unlawfully conceal, remove, mutilate, obliterate, falsify, or destroy any such record, proceeding, map, book, document, paper, or thing, shall be fined not more than two thousand dollars,

§ 788. ¹ Formerly R. S. Sec. 5394, 35 Stat. L. 1111.

§ 789. ¹ Formerly R. S. Sec. 5403, 35 Stat. L. 1111.

² *McInerney v. United States* 143 Fed. 729, 74 C. C. A. 655 (1st Cir.).

³ *United States v. DeGroat*, 30 Fed. 764.

⁴ *McInerney v. United States*, 143 Fed. 729, 74 C. C. A. 655 (1st Cir.).

or imprisoned not more than three years, or both ; and shall moreover forfeit his office and be forever afterward disqualified from holding any office under the Government of the United States.¹

This section applies to "officers." Hence, a *clerk* employed by the commissioners to the Five Civilized Tribes, who takes home certain records with him on evenings and Sundays but returns them the following day is not guilty of a violation of this section as he is not an "officer."²

§ 791. Criminal Code. Sec. 130. Forging Signature of Judge, etc.

Whoever shall forge the signature of any judge, register, or other officer of any court of the United States, or of any Territory thereof, or shall forge or counterfeit the seal of any such court, or shall knowingly concur in using any such forged or counterfeit signature or seal, for the purpose of authenticating any proceeding or document, or shall tender in evidence any such proceeding or document with false or counterfeit signature of any such judge, register, or other officer, or a false or counterfeit seal of the court, subscribed or attached thereto, knowing such signature or seal to be false or counterfeit, shall be fined not more than five thousand dollars and imprisoned not more than five years.¹

§ 792. Criminal Code. Sec. 131. Bribery of a Judge or Judicial Officer.

Whoever, directly or indirectly, shall give or offer, or cause to be given or offered any money, property or value of any kind, or any promise or agreement therefor, or any other bribe, to any judge, judicial officer, or other person authorized by any law of the United States to hear or determine any question, matter, cause, proceeding, or controversy, with intent to influence his action, vote, opinion, or decision, thereon, or because of any such action, vote,

§ 790. ¹ Formerly R. S. Sec. 5408,
35 Stat. L. 1112.

§ 791. ¹ Formerly R. S. Sec. 5419,
35 Stat. L. 1112.

² *Martin v. United States*, 168 Fed.

198, 93 C. C. A. 484 (8th Cir.).

opinion, or decision, shall be fined not more than twenty thousand dollars, or imprisoned not more than fifteen years, or both; and shall forever be disqualified to hold any office of honor, trust, or profit under the United States.¹

§ 793. Crim. Code. Sec. 132. Judge or Judicial Officer Accepting a Bribe, etc.

Whoever, being a judge of the United States, shall in anywise accept or receive any sum of money, or other bribe, present, or reward, or any promise, contract, obligation, gift, or security for the payment of money, or for the delivery or conveyance of anything of value, with the intent to be influenced thereby in any opinion, judgment, or decree in any suit, controversy, matter, or cause depending before him, or because of any such opinion, ruling, decision, judgment, or decree, shall be fined not more than twenty thousand dollars, or imprisoned not more than fifteen years, or both; and shall be forever disqualified to hold any office of honor, trust, or profit under the United States.¹

§ 794. Criminal Code. Sec. 133. Juror, Referee, Master, etc., or Judicial Officer, etc., Accepting a Bribe.

Whoever, being a juror, referee, arbitrator, appraiser, assessor, auditor, master, receiver, United States commissioner, or other person authorized by any law of the United States to hear or determine any question, matter, cause, controversy, or proceeding, shall ask, receive, or agree to receive, any money, property, or value of any kind, or any promise or agreement therefor, upon any agreement or understanding that his vote, opinion, action, judgment, or decision shall be influenced thereby, or because of any such vote, opinion, action, judgment, or decision, shall be fined not more than two thousand dollars, or imprisoned not more than two years, or both.¹

§ 795. Criminal Code. Sec. 134. Witness Accepting Bribe.

Whoever, being, or about to be, a witness upon a trial, hearing, or other proceeding, before any court or any

§ 792. ¹ Formerly R. S. Sec. 5449,
35 Stat. L. 1112.

§ 793. ¹ Formerly R. S. Sec. 5499,
35 Stat. L. 1112.

§ 794. ¹ 35 Stat. L. 1112.

officer authorized by the laws of the United States to hear evidence or take testimony, shall receive, or agree or offer to receive, a bribe, upon any agreement or understanding that his testimony shall be influenced thereby, or that he will absent himself from the trial, hearing, or other proceeding, or because of such testimony, or such absence, shall be fined not more than two thousand dollars, or imprisoned not more than two years, or both.¹

§ 796. Criminal Code. Sec. 135. Intimidation or Corruption of Witness, or Grand or Petit Juror, or Officer.

Whoever corruptly, or by threats or force, or by any threatening letter or communication, shall endeavor to influence, intimidate, or impede any witness, in any court of the United States or before any United States commissioner or officer acting as such commissioner, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or officer acting as such commissioner, in the discharge of his duty, or who corruptly or by threats or force, or by any threatening letter or communication, shall influence, obstruct, or impede, or endeavor to influence, obstruct, or impede, the due administration of justice therein, shall be fined not more than one thousand dollars, or imprisoned not more than one year, or both.¹

The indictment must allege the proceeding as well as the court in which it was pending that the defendant made the threats complained of.² The sufficiency of indictments under this section has been upheld in a number of cases.³ Two crimes denounced by the statute are first, "to improperly influence, intimidate, or impede a witness or officer in the discharge of a duty in any court of the United States by corrupt means, such as bribery, or

¹ § 795. ¹ 35 Stat. L. 1113.

² § 796. ¹ Formerly R. S. Sec. 5399, 35 Stat. L. 1113.

² United States v. Armstrong, 59 Fed. 568.

³ Davey v. United States, 208 Fed. 237, 125 C. C. A. 437 (7th Cir.);

United States v. Armstrong, 59 Fed. 568; Wilder v. United States, 143 Fed. 433, 74 C. C. A. 567 (4th Cir.); Pettibone v. United States, 148 U. S. 197, 37 L. ed. 419, 13 S. C. 542; Johnston v. United States, 87 Fed. 187, 30 C. C. A. 612 (5th Cir.).

by threats or force"; the second is the obstruction of the due administration of justice by anyone.⁴ The intent to commit a crime against the United States must be clear. A conspiracy to violate a State law is not punishable under this section.⁵ "As used in this particular statute, . . . any endeavor to impede and obstruct the due administration of justice in the inquiries specified, is corrupt."⁶ "The acts intended to be made criminal . . . are, as we think, not forbidden merely on the ground that such acts will of necessity prevent a fair trial, but on the ground that such acts may prevent such trial."⁷ An assault upon a United States Commissioner after the latter had committed the defendant to bail is not punishable under the statute. The Court bases its decision on the grounds that the Commissioner does not hold any Court and secondly that at the time of the assault there was nothing pending for determination by the Commissioner.⁸ Where the defendant committed an assault on a person two months after the latter had testified before a United States Commissioner who dismissed the case, he cannot be punished under this section.⁹ The defendant must have knowledge that the complainant is a witness.¹⁰ Conspiring to conceal a witness one day after the marshal had endorsed on the grand jury subpoena the following: ". . . after due and diligent search I have been unable to find Tracy S. Buckingham . . ." and returned same to the Clerk is a crime. The subpoena is still valid. The marshal's endorsement is held to be merely a record of what he did on a certain day.¹¹ Paying a witness to disregard a subpoena and absent himself from a grand jury investigation is made a crime.¹²

⁴ United States *v.* Bittinger, 24 Fed. Cas. No. 14598.

⁵ Pettibone *v.* United States, 148 U. S. 197, 37 L. ed. 419, 13 S. C. 542.

⁶ Per Ward, C. J., in *Bosselman v. United States*, 239 Fed. 82, 152 C. C. A. 132 (2d Cir.).

⁷ Per McDowell, D. J., in *Wilder v. United States*, 143 Fed. 433, 74 C. C. A. 567 (4th Cir.).

⁸ United States *v.* McLeod, 119 Fed. 416. See also *Ex parte McLeod*, 120 Fed. 130.

⁹ United States *v.* Thomas, 47 Fed. 807.

¹⁰ United States *v.* Bittinger, 24 Fed. Cas. No. 14578, 15 Am. Law Reg. (N. S.) 49; United States *v.* Kee, 39 Fed. 603; Pettibone *v.* United States, 148 U. S. 197, 205, 37 L. ed. 419, 13 S. C. 542.

¹¹ *Heinze v. United States*, 181 Fed. 322, 104 C. C. A. 510 (2d Cir.).

¹² *Heinze v. United States*, 181 Fed. 322, 104 C. C. A. 510 (2d Cir.).

The offense described in this section may also constitute a contempt of Court and be punishable as such.¹³

§ 797. Criminal Code. Sec. 136. Conspiring to Intimidate Party, Witness, or Juror.

If two or more persons conspire to deter by force, intimidation, or threat, any party or witness in any court of the United States, or in any examination before a United States commissioner or officer acting as such commissioner, from attending such court or examination, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or on account of his being or having been such juror, each of such persons shall be fined not more than five thousand dollars, or imprisoned not more than six years, or both.¹

This section is constitutional and is for the protection of the judicial organization and protects the parties, jurors, and witnesses.²

§ 798. Criminal Code. Sec. 137. Attempt to Influence Juror.

Whoever shall attempt to influence the action or decision of any grand or petit juror of any court of the United States upon any issue or matter pending before such juror, or before the jury of which he is a member, or pertaining to his duties, by writing or sending to him any letter or any communication in print or writing, in relation to such issue or matter, shall be fined not more than one thousand dollars, or imprisoned not more than six months, or both.¹

“It has been held a misdemeanor and a high contempt of Court in any individual, acting as a volunteer, to approach or

¹³ *Couts v. United States*, 249 Fed. 595, — C. C. A. — (8th Cir.).

§ 797. ¹ Formerly R. S. Sec. 5406, 25 Stat. L. 1113.

² *United States v. Sanges*, 48 Fed. 78.

§ 798. ¹ Formerly R. S. Sec. 5405, 35 Stat. L. 1113.

communicate with the grand jury in reference to any matter which either is or may come before them. 1 Whart. Crim. Law, § 507.”²

§ 799. Criminal Code. Sec. 138. Allowing Prisoner to Escape.

Whenever any marshal, deputy marshal, ministerial officer, or other person has in his custody any prisoner by virtue of process issued under the laws of the United States by any court, judge, or commissioner, and such marshal, deputy marshal, ministerial officer, or other person voluntarily suffers such prisoner to escape, he shall be fined not more than two thousand dollars, or imprisoned not more than two years, or both.¹

A prisoner who conspires with his custodian for his escape may be indicted for a conspiracy to violate this section. “The prisoner is not condemned for regaining his liberty, but for conspiring with, and thereby causing, the guard to be false to his duty, in voluntarily suffering him to escape.”² A sheriff of a county jail who permits Federal prisoners committed therein to leave the jail and return at their pleasure may be punished as for a contempt.³ A keeper of a county jail where Federal prisoners are committed is included in the terms of this section.⁴

§ 800. Criminal Code. Sec. 139. Application of Preceding Section.

The preceding section shall be construed to apply not only to cases in which the prisoner who escaped was charged or found guilty of an offense against the laws of the United States, and to cases in which the prisoner may be in custody charged with offenses against any foreign government with which the United States have treaties of extradition, but also to cases in which the prisoner may be held in custody for removal to or from the Philippine Islands as provided by law.¹

² Per Dick, J., in *United States v.*

Kilpatrick, 16 Fed. 765.

§ 799. ¹ Formerly R. S. Sec. 5409, 35 Stat. L. 1113.

² *Ex parte Lyman*, 202 Fed. 303.

³ *Ex parte Shores*, 195 Fed. 627.

⁴ *Ibid.*

§ 800. ¹ Formerly R. S. Sec. 5410, 35 Stat. L. 1113.

§ 801. Criminal Code. Sec. 140. Obstructing Process or Assaulting an Officer.

Whoever shall knowingly and willfully obstruct, resist, or oppose any officer of the United States, or other person duly authorized, in serving, or attempting to serve or execute, any mesne process or warrant, or any rule or order, or any other legal or judicial writ or process of any court of the United States, or United States Commissioner, or shall assault, beat, or wound any officer or other person duly authorized, knowing him to be such officer, or other person so duly authorized in serving or executing any such writ, rule, order, process, warrant, or other legal or judicial writ or process, shall be fined not more than three hundred dollars and imprisoned not more than one year.¹

An indictment under this section may be in the language of the statute.² An indictment which charges "that he (the defendant) did knowingly, willfully and unlawfully obstruct, resist and oppose" the officer, sufficiently sets forth the manner of resistance.³ The indictment must show that the Commissioner issuing the writ had the power to do so.⁴ The three requisites that make up the offense denounced by this section are (1) That a legal process, warrant, etc. was issued by a court of the United States; (2) that such legal process was in the hands of some officer of the United States, to serve the same, (3) that thereafter some one knowingly and willfully obstructed, resisted or opposed such officer in serving the same.⁵ The words "knowingly" and "willfully", used here "imply that she must have known that the order (to remove her from the court room) directed the marshal to remove her, and, knowing such fact, that she determined, with a bad intent, to resist him in its execution."⁶ Actual violence need not be shown; "threats and acts intended to terrify or calculated by their nature to terrify a prudent and reasonable officer, are sufficient, even though he be not prevented thereby

§ 801. ¹ Formerly R. S. Sec. 5398, 35 Stat. L. 1114.

² *Blake v. United States*, 71 Fed. 286, 18 C. C. A. 117 (1st Cir.).

³ *United States v. Hudson*, 1 Hask. 527, 26 Fed. Cas. No. 15412.

⁴ *United States v. Stowell*, 2 Curtis

153, 27 Fed. Cas. No. 16409. See also *Pettibone v. United States*, 148

U. S. 197, 37 L. ed. 419, 13 S. C. 546.

⁵ *United States v. Tinkelpaugh*, 3 Blatchf. 425, 28 Fed. Cas. No. 16526.

⁶ *United States v. Terry*, 42 Fed.

317, s. c. 41 Fed. 771.

from executing his process.”⁷ “The offense is complete when the person in possession refuses, and, by threats of violence, which it is in his power to enforce, prevents the officer from dispossessing him.”⁸ Resisting and assaulting a deputy marshal who has a warrant to serve is a violation of this statute.⁹ Interference with a special custodian of a United States Marshal who is holding property under a writ of attachment is a crime. Retaining possession of the property levied on is a part of the process of executing the writ.¹⁰ A sheriff holding certain persons in his custody under a State writ may disregard the verbal orders of a United States Commissioner to deliver up the prisoners for examination, and insist on written orders before doing so.¹¹ The keeper of a county jail to whom Federal prisoners have been intrusted is an officer of the United States for the purpose of this section; and rescuing a prisoner from him is made a crime.¹² The defendant suspecting that he was about to be arrested called on the deputy marshal whom he thought might have the warrant for his arrest and made inquiries, but the deputy marshal refused to give him any information. Thereafter, he sought the arrest of the defendant; the latter fired with intent to kill. The defendant was convicted and counsel raised several questions regarding the charge to the jury. The conviction was upheld.¹³ On the general proposition that an officer must act within the scope of his power see *United States v. Pears*.¹⁴ For a discussion on the law of bail and where a deputy marshal refuses to accept bail, and may be resisted in his attempt to imprison the defendant, see *United States v. Mundell*.¹⁵ Resistance to the execution of a void writ is no crime.¹⁶ Under the Treaty of 1892 between Great

⁷ *United States v. Smith*, 1 Dill. 212, 27 Fed. Cas. No. 16333. See also *Charge to Grand Jury*, 2 Curtis, 637, 30 Fed. Cas. No. 18250.

⁸ *United States v. Lowry*, 2 Wash. (C. C.) 169, 26 Fed. Cas. No. 15636.

⁹ *United States v. Lukins*, 3 Wash. (C. C.) 335, 26 Fed. Cas. No. 15639.

¹⁰ *United States v. McDonald*, 8 Biss. 439, 26 Fed. Cas. No. 15667.

¹¹ *United States v. Martin*, 17 Fed. 150.

¹² *United States v. Martin*, 17 Fed. 150.

¹³ *Cross v. United States*, 2 Hayw. & H. 290, 30 Fed. Cas. No. 18286.

¹⁴ 3 Woods, 510, 25 Fed. Cas. No. 15080.

¹⁵ 1 Hughes, 415, 27 Fed. Cas. No. 15834.

¹⁶ *United States v. Slaymaker*, 4 Wash. (C. C.) 169, 27 Fed. Cas. No. 16313.

Britain and the United States, a British Consul has the power to require from the proper authorities assistance for the apprehension and restoration of deserting seamen. Therefore, a United States Commissioner has no power to order a marshal to restore deserters on board their ship under the direction of the consul. Under these circumstances it was held that interference with a United States Marshal while engaged in carrying out such order is not a violation of this section.¹⁷ The United States District Courts have jurisdiction over crimes committed by an Indian upon a white man on an Indian Reservation. Therefore, the interference by a keeper of a jail where two Indians charged with such crime, with a marshal who was attempting to serve a writ on such Indians is a crime.¹⁸ An Indian policeman engaged in carrying out a writ issued to him by the Indian agent is not an officer of the United States, as contemplated by this section.¹⁹

§ 802. Criminal Code. Sec. 141. Rescuing, etc., Prisoner; Concealing, etc., Person for Whom Warrant Has Issued.

Whoever shall rescue or attempt to rescue, from the custody of any officer or person lawfully assisting him, any person arrested upon a warrant or other process issued under the provisions of any law of the United States, or shall, directly or indirectly, aid, abet, or assist any person so arrested to escape from the custody of such officer or other person, or shall harbor or conceal any person for whose arrest a warrant or process has been so issued, so as to prevent his discovery and arrest, after notice or knowledge of the fact that a warrant or process has been issued for the apprehension of such person, shall be fined not more than one thousand dollars, or imprisoned not more than six months, or both.¹

In charging a conspiracy to accomplish an unlawful rescue, it is not necessary that the charge go further than the language of the statute which defines the offense.² In an indictment under this

¹⁷ *United States v. Kelly*, 108 Fed. 538.

¹⁸ *United States v. Martin*, 14 Fed. 817.

¹⁹ *United States v. Mullin*, 71 Fed. 682. Compare: *United States v. Stickrath*, 242 Fed. 151.

§ 802. ¹ Formerly R. S. Sec. 5516, 35 Stat. L. 1114.

² *De Lacey v. United States*, 249 Fed. 625, 161 C. C. A. 535 (9th Cir.).

section containing two counts, it is not prejudicial error to refuse to direct a verdict of acquittal on the first count if the conviction on the second count is well supported by the evidence.³

§ 803. Criminal Code. Sec. 142. Rescue at Execution.

Whoever, by force, shall set at liberty or rescue any person found guilty in any court of the United States of any capital crime, while going to execution or during execution, shall be fined not more than twenty-five thousand dollars and imprisoned not more than twenty-five years.¹

§ 804. Criminal Code. Sec. 143. Rescue of Prisoner.

Whoever, by force, shall set at liberty or rescue any person who, before conviction, stands committed for any capital crime; or whoever, by force, shall set at liberty or rescue any person committed for or convicted of any offense other than capital, shall be fined not more than five hundred dollars and imprisoned not more than one year.¹

This section is applicable to a rescue from an Indian jail for a crime committed on an Indian reservation.²

§ 805. Criminal Code. Sec. 144. Rescue of Body of Executed Offender.

Whoever, by force, shall rescue or attempt to rescue, from the custody of any marshal or his officers, the dead body of an executed offender, while it is being conveyed to a place of dissection, as provided by section three hundred and thirty-one hereof, or by force shall rescue or attempt to rescue such body from the place where it has been deposited for dissection in pursuance of that section, shall be fined not more than one hundred dollars, or imprisoned not more than one year, or both.¹

³ *Orth v. United States*, 252 Fed. 566, 569, — C. C. A. — (4th Cir.); (two cases).

§ 803. ¹ Formerly R. S. Sec. 5400, 35 Stat. L. 1114.

§ 804. ¹ Formerly R. S. Sec. 5401, 35 Stat. L. 1114.

² *United States v. Clapox*, 35 Fed. 575; approved in *United States v. Belt*, 128 Fed. 168.

§ 805. ¹ Formerly R. S. Sec. 5402, 35 Stat. L. 1114.

§ 806. Criminal Code. Sec. 145. Extortion by Informer.

Whoever shall, under a threat of informing, or as a consideration for not informing, against any violation of any law of the United States, demand or receive any money or other valuable thing, shall be fined not more than two thousand dollars, or imprisoned not more than one year, or both.¹

An indictment which charges the defendant with receiving money under a threat of informing and also the receiving of money as a consideration for not informing is not bad for duplicity where there is but one criminal transaction.² Nor is it necessary to set up what particular law has been violated by the person threatened.³ Under the Criminal Code of California, the State Courts may punish for the extortion by an informer and the jurisdiction of the Federal Courts in this instance is not exclusive.⁴

§ 807. Criminal Code. Sec. 146. Misprision of Felony.

Whoever, having knowledge of the actual commission of the crime of murder or other felony cognizable by the courts of the United States, conceals and does not as soon as may be disclose and make known the same to some one of the judges or other persons in civil or military authority under the United States, shall be fined not more than five hundred dollars, or imprisoned not more than three years, or both.¹

A person may be prosecuted for extortion under a State statute, notwithstanding the above section under which prosecution may be had in the Federal Court. This section does not take away or impair the jurisdiction of the Courts of the several States under

§ 806. ¹ Formerly R. S. Sec. 5484, 35 Stat. L. 1114.

² *United States v. Fero*, 18 Fed. 901; *Crain v. United States*, 162 U. S. 625, 40 L. ed. 901, 16 S. C. 952; *United States v. Delaware L. & W. R. Co.*, 152 Fed. 269.

³ *Roberts v. United States*, 248 Fed. 873, — C. C. A. — (9th Cir.).

⁴ *Sexton v. California*, 189 U. S. 319, 47 L. ed. 833, 23 S. C. 543, but see Section 256 of Federal Judicial Code.

§ 807. ¹ Formerly R. S. Sec. 5390, 35 Stat. L. 114.

their laws to proceed and punish as is therein provided for. It has also been held *arguendo* that the jurisdiction of the State Court is at least concurrent with that of the courts of the United States.² A conviction under a State statute would not bar a prosecution in the Federal Court under the above section of the Federal Criminal Code.³

² *Sexton v. California*, 189 U. S. 319, 47 L. ed. 833, 23 S. C. 543.

³ *United States v. Casey*, 247 Fed. 362; *Gross v. North Carolina*, 132 U. S. 131, 139, 33 L. ed. 287.

CHAPTER LII

CRIMINAL CODE, CHAPTER SEVEN

OFFENSES AGAINST THE CURRENCY, COINAGE, ETC.

- § 808. Crim. Code § 147. "Obligation or Other Security of the United States" Defined.
- § 809. Crim. Code § 148. Forging or Counterfeiting United States Securities.
- § 810. Crim. Code § 149. Counterfeiting National Bank Notes.
- § 811. Crim. Code § 150. Using Plates to Print Notes without Authority, etc.
- § 812. Crim. Code § 151. Passing, Selling, Concealing, etc., Forged Obligations.
- § 813. Crim. Code § 152. Taking Impressions of Tools, Implements, etc.
- § 814. Crim. Code § 153. Having in Possession Unlawfully Such Impressions.
- § 815. Crim. Code § 154. Buying, Selling, or Dealing in Forged Bonds, Notes, etc.
- § 816. Crim. Code § 155. Secreting or Removing Tools or Material Used for Printing Bonds, Notes, Stamps, etc.
- § 817. Crim. Code § 156. Counterfeiting Notes, Bonds, etc., of Foreign Governments.
- § 818. Crim. Code § 157. Passing Such Forged Notes, Bonds, etc.
- § 819. Crim. Code § 158. Counterfeiting Notes of Foreign Banks.
- § 820. Crim. Code § 159. Passing Such Counterfeit Bank Notes.
- § 821. Crim. Code § 160. Having in Possession Such Forged Notes, Bonds, etc.
- § 822. Crim. Code § 161. Having Unlawfully in Possession or Using Plates for Such Notes, Bonds, etc.
- § 823. Crim. Code § 162. Connecting Parts of Different Instruments.
- § 824. Crim. Code § 163. Counterfeiting Gold or Silver Coins or Bars.
- § 825. Crim. Code § 164. Counterfeiting Minor Coins.
- § 826. Crim. Code § 165. Falsifying, Mutilating, or Lightening Coinage.
- § 827. Crim. Code § 166. Debasement of Coinage by Officers of the Mint.
- § 828. Crim. Code § 167. Making or Uttering Coins in Resemblance of Money.

- § 829. Crim. Code § 168. Making or Issuing Devices of Minor Coins.
- § 830. Crim. Code § 169. Counterfeiting, etc., Dies for Coins of United States.
- § 831. Crim. Code § 170. Counterfeiting, etc., Dies for Foreign Coins.
- § 832. Crim. Code § 171. Making, Importing, or Having in Possession Tokens, Prints, etc., Similar to United States, or Foreign Coins.
- § 833. Crim. Code § 172. Counterfeit Obligations, Securities, Coins, or Material for Counterfeiting, to Be Forfeited.
- § 834. Crim. Code § 173. Issue of Search Warrant for Suspected Counterfeits, etc., Forfeiture.
- § 835. Crim. Code § 174. Circulating Bills of Expired Corporations.
- § 836. Crim. Code § 175. Imitating National Bank Notes with Printed Advertisements Thereon.
- § 837. Crim. Code § 176. Mutilating or Defacing National Bank Notes.
- § 838. Crim. Code § 177. Imitating United States Securities or Printing Business Cards on Them.
- § 839. Crim. Code § 178. Notes of Less than One Dollar Not to Be Issued.

§ 808. Criminal Code. Sec. 147. "Obligation or Other Security of the United States" Defined.

The words "obligation or other security of the United States" shall be held to mean all bonds, certificates of indebtedness, national bank currency, coupons, United States notes, Treasury notes, gold certificates, silver certificates, fractional notes, certificates of deposit, bills, checks, or drafts for money, drawn by or upon authorized officers of the United States, stamps and other representatives of value, of whatever denomination, which have been or may be issued under any Act of Congress.¹

The definition of the words "obligations or other securities of the United States" is not intended to be general, but is limited in its application. The word "security", used in its proper sense, does not include postage stamps.² Postage stamps, while in the hands of the Government, are personal property, notwithstanding the fact that they are an "obligation or other security of the United States", under this section.³ Uncanceled postage stamps are obligations or securities of the United States.⁴ But a can-

§ 808. ¹ Formerly R. S. Sec. 5413,
35 Stat. L. 1115.

² 22 Ops. Atty.-Gen. 40 (1898):

³ *Jolly v. United States*, 170 U. S.
402, 42 L. ed. 1085, 18 S. C. 624.

⁴ 28 Ops. Atty.-Gen. 201.

celed postage stamp, or a facsimile imprint thereof, is not an obligation or security within the meaning of this section.⁵ A United States Treasury Warrant is an "obligation" of the United States", and a pension check drawn by an authorized officer of the United States, upon an Assistant Treasurer of the United States, is not an "obligation of the United States", under the foregoing section.⁶ United States compound interest Treasury notes are "obligations of the United States."⁷ A certificate of deposit issued by a paymaster of the United States Army to an enlisted man is an "obligation or other security of the United States."⁸ The form of words "obligation or other security of the United States" embraces internal revenue stamps, as representatives of value issued by the Government.⁹

§ 809. Criminal Code. Sec. 148. Forging or Counterfeiting United States Securities.

Whoever, with intent to defraud, shall falsely make, forge, counterfeit, or alter any obligation or other security of the United States shall be fined not more than five thousand dollars and imprisoned not more than fifteen years.¹

In an indictment for forgery of an endorsement on a United States draft under this section, separate averments, 1st, that the draft itself constituted the obligation forged, and 2d, that the false endorsement constitutes the forgery, are repugnant, and do not properly lay the offense. The pleader should have distinctly charged that the genuine draft with the forged indorsement upon it constitute together a forged obligation of the United States.² A certificate of deposit issued by a paymaster of the United States Army to an enlisted man is "an obligation or security of the United States", forgery of which is made a criminal offense by this section.³ An indictment alleging forgery with

⁵ 27 Ops. Atty.-Gen. 125.

⁶ *United States v. Albert*, 45 Fed. 552.

⁷ *United States v. Owens*, 37 Fed. 112.

⁸ *Neall v. United States*, 118 Fed. 699, 56 C. C. A. 31 (9th Cir.).

⁹ 14 Ops. Atty.-Gen. 528.

§ 809. ¹ Formerly R. S. Stat. 5414, 35 Stat. L. 1115.

² *De Lemos v. United States*, 91 Fed. 497, 33 C. C. A. 655 (5th Cir.).

³ *Neall v. United States*, 118 Fed. 699, 56 C. C. A. 31 (9th Cir.).

intent to defraud both the United States and a particular person is not bad for duplicity.⁴ The utterance of a forged security or obligation of the United States was a mere misdemeanor, and not an "infamous crime" or a felony, and prosecution of a person so charged by *information*, instead of by indictment, was permissible.⁵ In an indictment for violation of the section for counterfeiting United States compound interest Treasury notes, it is unnecessary to allege that the counterfeit note is in the likeness of a genuine obligation of the United States, authorized by law, that being implied by the use, in the indictment, of this precise language of the statute.⁶ Where it is stated in the indictment that the forged obligation has been suppressed or destroyed by defendant, the tenor of the instrument may be proved by a sworn copy or by parole evidence.⁷ To write the name of the payee, with intent to defraud, on the back of a post office warrant, a security of the United States, is forgery. It is *unnecessary, in such indictment*, to aver a specific intent to defraud the United States; such intent being inferable from the language of the statute, indicating that the intent is to defraud the United States.⁸ A genuine pension check drawn by an authorized officer of the United States, upon an assistant treasurer of the United States, is not "an obligation or other security of the United States" within the counterfeiting section. Evidence that defendant forged an endorsement of such a pension check of the United States is not sufficient to sustain a verdict of guilty under an indictment charging defendant with counterfeiting a security of the United States.⁹

§ 810. Criminal Code. Sec. 149. Counterfeiting National Bank Notes.

Whoever shall falsely make, forge, or counterfeit, or cause or procure to be made, forged, or counterfeited, or

⁴ Neall *v.* United States, 118 Fed. 699, 56 C. C. A. 31 (9th Cir.).

⁵ In *re* Wilson, 18 Fed. 33. But it is now a felony under Sec. 335 of Crim. Code.

⁶ United States *v.* Owens, 37 Fed. 112, *citing* United States *v.* Jolly, 37 Fed. 108.

⁷ United States *v.* Britton, 2 Mason, 464, Fed. Cas. No. 14650.

⁸ United States *v.* Jolly, 37 Fed. 108, *Followed* in United States *v.* Albert, 45 Fed. 552.

⁹ United States *v.* Albert, 45 Fed. 552.

shall willingly aid or assist in falsely making, forging, or counterfeiting, any note in imitation of, or purporting to be in imitation of, the circulating notes issued by any banking association now or hereafter authorized and acting under the laws of the United States; or whoever shall pass, utter, or publish, or attempt to pass, utter, or publish, any false, forged, or counterfeited note, purporting to be issued by any such association doing a banking business, knowing the same to be falsely made, forged, or counterfeited; or whoever shall falsely alter, or cause or procure to be falsely altered, or shall willingly aid or assist in falsely altering, any such circulating notes, or shall pass, utter, or publish, or attempt to pass, utter, or publish as true, any falsely altered or spurious circulating note issued, or purporting to have been issued, by any such banking association, knowing the same to be falsely altered or spurious, shall be fined not more than one thousand dollars and imprisoned not more than fifteen years.¹

An indictment for attempting to pass a falsely altered note of the United States currency need not allege that the offense was committed with felonious intent. The offense is now a felony.² An allegation that the defendant passed a Confederate note bearing some resemblance to a United States note or a national bank note, does not constitute an indictable offense within this section.³ The unauthorized signing of names purporting to be those of president and cashier, to national bank notes, constitute the crime of forgery of those notes under this statute, whether the names so signed are in fact those of the president and cashier of the bank, or of fictitious persons. The fact that bank notes with such forged signatures have been made redeemable by statute, does not relieve the forgery of such signatures from liability.⁴ Evidence supplying motive for counterfeiting bank notes may be introduced, even though such evidence has a tendency to show the defendant guilty of another crime as

§ 810. ¹ Formerly R. S. Sec. 5415, 35 Stat. L. 1115.

² *Leib v. Halligan*, 236 Fed. 82, 149 C. C. A. 292 (9th Cir.).

³ *United States v. Wilson*, 44 Fed. 751.

⁴ *Logan v. United States*, 123 Fed. 291, 59 C. C. A. 476 (6th Cir.).

well.⁵ For uttering a raised silver certificate of the United States, evidence that defendant attempted to pass a similar bill at a previous time is admissible as evidence of fraudulent intent of accused.⁶ In a prosecution for passing false or forged national bank notes, knowledge that they were falsely made is an essential element of the offense, aside from mere proof that the false note was passed.⁷ A conviction by a State Court for passing counterfeit national bank notes will be set aside on *habeas corpus* proceedings in a United States District Court for the reason that State courts have no jurisdiction over this class of cases.⁸

§ 811. Criminal Code. Sec. 150. Using Plates to Print Notes without Authority, etc.

Whoever, having control, custody, or possession of any plate, stone, or other thing, or any part thereof, from which has been printed, or which may be prepared by direction of the Secretary of the Treasury for the purpose of printing, any obligation or other security of the United States, shall use such plate, stone, or other thing, or any part thereof, or knowingly suffer the same to be used for the purpose of printing any such or similar obligation or other security, or any part thereof, except as may be printed for the use of the United States by order of the proper officer thereof; or whoever by any way, art or means shall make or execute, or cause or procure to be made or executed, or shall assist in making or executing any plate, stone, or other thing, in the likeness of any plate designated for the printing of such obligation or other security; or whoever shall sell any such plate, stone, or other thing or bring into the United States or any place subject to the jurisdiction thereof, from any foreign place, any such plate, stone, or other thing, except under the direction of the Secretary of the Treasury or other proper officer, or with any other intent, in either case, than that such plate, stone or other thing be used for the printing of the obligations or other securities of the United

⁵ *Thompson v. United States*, 144 Fed. 14, 75 C. C. A. 172 (1st Cir.).

⁶ *Schultz v. United States*, 200 Fed. 234, 118 C. C. A. 420 (8th Cir.).

⁷ *Gallagher v. United States*, 144 Fed. 87, 75 C. C. A. 245 (1st Cir.).

⁸ *Ex parte Houghton*, 7 Fed. 657, 8 Fed. 897.

States; or whoever shall have in his control, custody, or possession any plate, stone, or other thing in any manner made after or in the similitude of any plate, stone, or other thing, from which any such obligation or other security has been printed, with intent to use such plate, stone, or other thing, or to suffer the same to be used in forging or counterfeiting any such obligation or other security, or any part thereof; or whoever shall have in his possession or custody, except under authority from the Secretary of the Treasury or other proper officer, any obligation or other security made or executed, in whole or in part, after the similitude of any obligation or other security issued under the authority of the United States, with intent to sell or otherwise use the same; or whoever shall print, photograph, or in any other manner make or execute, or cause to be printed, photographed, made, or executed, or shall aid in printing, photographing, making, or executing any engraving, photograph, print, or impression in the likeness of any such obligation or other security, or any part thereof, or shall sell any such engraving, photography, print, or impression, except to the United States, or shall bring into the United States or any place subject to the jurisdiction thereof, from any foreign place, any such engraving, photograph, print, or impression, except by direction of some proper officer of the United States; or whoever shall have or retain in his control or possession, after a distinctive paper has been adopted by the Secretary of the Treasury for the obligations and other securities of the United States, any similar paper adapted to the making of any such obligation or other security, except under the authority of the Secretary of the Treasury or some other proper officer of the United States, shall be fined not more than five thousand dollars, or imprisoned not more than fifteen years, or both.¹

The passing of a counterfeit obligation of the United States is, under this section, an infamous crime and must accordingly be proceeded against by indictment. A person sentenced upon a prosecution by information is entitled to be discharged on *habeas*

§ 811. ¹ Formerly R. S. Sec. 5430, counterfeiting statute. United States 35 Stat. L. 1116. This is not a *v. Weber* 210 Fed. 973.

corpus proceedings.² An indictment under this section cannot be supported for counterfeiting bank certificates where the bills alleged to be "engraved and printed, etc." after the similitude of an obligation of the United States, were in fact genuine bills issued by a bank for circulation.³ To justify a conviction the following must be proved: (1) That the paper is in fact an evidence of obligation, which would be regarded as a security; (2) That it is in its entirety sufficiently similar to a government obligation or security to deceive an ordinary person, using ordinary care, in a business transaction; (3) That the instrument was in the defendant's possession, without proper authority and with intent to use it in such a way as to profit thereby.⁴ The questions whether defendant had the paper in his possession with the intent to pass it, and whether he knew at the time that the note was worthless, are questions of fact.⁵ Possession is not a necessary element of the offense under this section. The similarity need not be so great as to deceive expert or cautious men; sufficient similarity to a genuine United States obligation to deceive an honest, unsuspecting person, of ordinary observation, dealing with a person supposed to be honest, is enough to lay the offense. Whether or not there is such a similarity as would deceive such an honest, unsuspecting person, is ordinarily a question of fact for the jury.⁶ An instrument calculated to deceive an unsuspecting person of ordinary prudence into accepting it as good money, is an obligation "after the similitude of any obligation or other security" issued under the authority of the United States.⁷ Similitude of the obligation in question to a genuine obligation of the United States is a question of fact for the jury.⁸ The passage of a Confederate bill as money

² *Ex parte Wilson*, 114 U. S. 417, 29 L. ed. 89; 5 S. C. 935. See *Leib v. Halligan*, 236 Fed. 82, 149 C. C. A. 292 (9th Cir.).

³ *United States v. Conners*, 111 Fed. 734. *Followed in United States v. Pitts*, 112 Fed. 522.

⁴ *United States v. Fitzgerald*, 91 Fed. 374.

⁵ *United States v. Stevens*, 52 Fed. 120.

⁶ *United States v. Weber*, 210 Fed. 973.

⁷ *Wiggains v. United States*, 214 Fed. 970, 131 C. C. A. 266 (8th Cir.); *United States v. Kuhl*, 85 Fed. 624.

⁸ *United States v. Kuhl*, 85 Fed. 624. See also *United States v. Barrett*, 111 Fed. 369, 372; *United States v. Stevens*, 52 Fed. 120.

is not in violation of this section.⁹ To constitute a violation of that provision, the instrument must have been intended to simulate an obligation of the United States, at its inception, and, unless it possesses sufficient similitude to such United States obligation to perpetrate a common law cheat, it is not an offense against the United States but comes within the authority of the State.¹⁰ It is not sufficient to warrant conviction for a person to have in his possession, without authority, paper adapted to the making of United States obligations or securities, to prove merely that the defendant had in his possession papers which might be used to make counterfeit obligations or securities. The fact that a note was originally issued by a State Bank does not exempt the holder of it from prosecution under this section, after the bank has become insolvent and the note worthless, if he holds it with intent to pass it as a genuine note or obligation of the United States.¹¹

§ 812. Criminal Code. Sec. 151. Passing, Selling, Concealing, etc., Forged Obligations.

Whoever, with intent to defraud, shall pass, utter, publish, or sell, or attempt to pass, utter, publish, or sell, or shall bring into the United States or any place subject to the jurisdiction thereof, with intent to pass, publish, utter, or sell, or shall keep in possession or conceal with like intent, any falsely made, forged, counterfeited, or altered obligation or other security of the United States, shall be fined not more than five thousand dollars and imprisoned not more than fifteen years.¹

A prosecution by information under this section is not permissible because the offense is infamous in its nature and under the Fifth Amendment the accused must be indicted by a Grand Jury as required by that amendment, or else the prisoner may be discharged on *habeas corpus*.² This rule applies also when the trial court has exceeded its jurisdiction, though sometimes the Court will refuse *habeas corpus* and remit the prisoner to his remedy

⁹ United States v. Barrett, 111 Fed. 369.

¹⁰ Krakowski v. United States, 161 Fed. 88, 88 C. C. A. 252 (2d Cir.).

¹¹ United States v. Stevens, 52 Fed. 120.

§ 812. ¹ Formerly R. S. Sec. 5431, 35 Stat. L. 1161.

² Ex parte Wilson, 114 U. S. 417, 29 L. ed. 89, 5 S. C. 935.

by writ of error.³ The writ of *habeas corpus* will not issue unless the lower court, under whose warrant the prisoner is held, is without jurisdiction.⁴ An indictment lies for each one of the obligations the defendant may have in his possession.⁵ This section is to be interpreted as a general provision against counterfeiting obligations, and it is not therefore essential in an indictment for counterfeiting to state that the alleged counterfeits are in the likeness or similitude of a genuinely issued note or obligation. The Court will take judicial notice of the forms of obligations and coins and these therefore need not be proved.⁶ An indictment under the previous section is sufficient if the failure to set forth the counterfeit obligations is explained by alleging that the Grand Jury did not have them in its possession or control.⁷ The test is not whether the obligation counterfeited is a valid one, or whether there was a criminal intent, but is: was it made after the similitude of a United States legal tender note, — and therefore two invalid notes fastened back to back resembling a United States note, come within the rule.⁸ As State Bank notes are redeemable by the United States Treasury, an unissued State Bank note is within the statute.⁹ But an ordinary bill or note issued by a bank is not such an obligation.¹⁰ This section is to be interpreted in the light of the common law and consequently an indictment is insufficient which merely sets forth the offense in the words of the statute, but in addition knowledge that the instrument is forged and counterfeit is essential to make out the crime.¹¹ This rule was established in order that the accused may be apprised of the nature of the accusation against him with reasonable cer-

³ *Riggins v. United States*, 199 U. S. 547, 50 L. ed. 303, 26 S. C. 147; *Urquhart v. Brown*, 205 U. S. 179, 51 L. ed. 760, 27 S. C. 459; *Henry v. Henkel*, 235 U. S. 219, 228, 59 L. ed. 203, 35 S. C. 54.

⁴ *In re Chapman*, 156 U. S. 211, 215, 39 L. ed. 401, 15 S. C. 331; *Ex parte Blair*, 253 Fed. 800, 804.

⁵ *Logan v. United States*, 123 Fed. 291, 59 C. C. A. 476 (6th Cir.).

⁶ *United States v. Owens*, 37 Fed. 112.

⁷ *United States v. Howell*, 64 Fed. 110.

⁸ *Leib v. Halligan*, 236 Fed. 82, 149 C. C. A. 292 (9th Cir.).

⁹ *Wiggains v. United States*, 214 Fed. 970, 131 C. C. A. 266 (8th Cir.); *United States v. U. S. Fidelity and Guaranty Co.*, 247 Fed. 16, 18, 159 C. C. A. 234 (6th Cir.).

¹⁰ *United States v. Pitts*, 112 Fed. 522.

¹¹ *United States v. Carll*, 105 U. S. 611, 26 L. ed. 1135.

tainty.¹² The offense being a statutory one, the common law requirement of an intent to defraud a particular person is not necessary, and a general intent to defraud is sufficient.¹³ In addition to showing possession of counterfeit certificates, either an intent to defraud or an intent to pass, utter, publish, or sell must be shown, but not both; mere possession, knowing the certificates were counterfeit, is not sufficient.¹⁴ Fraudulent or felonious intent is not necessary to constitute the offense. If defendant had in his possession, with intent to use or sell, a paper made, in whole or in part, after the similitude of an obligation of the United States, it is sufficient to lay the offense.¹⁵ Passing a note genuinely issued by a State Bank is not passing a counterfeit United States note although it may be worthless, and resemble a United States note; the question of presentation is immaterial.¹⁶ Since National Bank notes put in circulation without the signature of the president and cashier are, by statute, redeemable by the Treasury, such notes constitute an obligation or security.¹⁷ An altered pension check is not such an obligation under this section.¹⁸ Neither is a counterfeit Confederate bill, but the State can control in such cases;¹⁹ nor is a mining bond resembling a Government bond such an obligation.²⁰ But uttering a genuine Government draft with a forged endorsement comes under the former section.²¹

§ 813. Criminal Code. Sec. 152. Taking Impressions of Tools, Implements, etc.

Whoever, without authority from the United States, shall take, procure, or make, upon lead, foil, wax, plaster,

¹² *Foster v. United States*, 253 Fed. 481, 483, — C. C. A. — (9th Cir.).

¹³ *United States v. Jolly*, 37 Fed. 108; *Thompson v. United States*, 202 Fed. 401, 405, 120 C. C. A. 575 (9th Cir.); *Morris v. United States*, 229 Fed. 516, 520, 143 C. C. A. 584 (8th Cir.); *Dosset v. United States*, 248 Fed. 902, 904, 161 C. C. A. 20 (8th Cir.).

¹⁴ *United States v. Provenzano*, 171 Fed. 675.

¹⁵ *Leib v. Halligan*, 236 Fed. 82, 149 C. C. A. 292 (9th Cir.).

¹⁶ *United States v. Beebe*, 149 Fed. 618.

¹⁷ *Wiggains v. United States*, 214 Fed. 970, 131 C. C. A. 266 (8th Cir.).

¹⁸ *United States v. Albert*, 45 Fed. 552.

¹⁹ *United States v. Barrett*, 111 Fed. 369.

²⁰ *United States v. Williams*, 14 Fed. 550; *United States v. Sprague*, 48 Fed. 828.

²¹ *De Lemos v. United States*, 91 Fed. 497, 33 C. C. A. 655 (5th Cir.).

paper, or any other substance or material, an impression, stamp, or imprint of, from, or by the use of any bedplate, bedpiece, die, roll, plate, seal, type, or other tool, implement, instrument, or thing used or fitted or intended to be used in printing, stamping, or impressing, or in making other tools, implements, instruments, or things to be used or fitted or intended to be used in printing, stamping, or impressing any kind or description of obligation or other security of the United States now authorized or hereafter to be authorized by the United States, or circulating note or evidence of debt of any banking association under the laws thereof, shall be fined not more than five thousand dollars, or imprisoned not more than ten years, or both.¹

§ 814. Criminal Code. Sec. 153. Having in Possession Unlawfully Such Impressions.

Whoever, with intent to defraud, shall have in his possession, keeping, custody, or control, without authority from the United States, any imprint, stamp, or impression, taken or made upon any substance or material whatsoever, of any tool, implement, instrument, or thing, used, or fitted or intended to be used, for any of the purposes mentioned in the preceding section; or whoever, with intent to defraud, shall sell, give, or deliver any such imprint, stamp, or impression to any other person, shall be fined not more than five thousand dollars, or imprisoned not more than ten years, or both.¹

§ 815. Criminal Code. Sec. 154. Buying, Selling, or Dealing in Forged Bonds, Notes, etc.

Whoever shall buy, sell, exchange, transfer, receive, or deliver any false, forged, counterfeited, or altered obligation or other security of the United States, or circulating note of any banking association organized or acting under the laws thereof, which has been or may hereafter be issued by virtue of any Act of Congress, with the intent that the same be passed, published, or used as true and genuine,

§ 813. ¹ Formerly R. S. Sec. 5432,
35 Stat. L. 1117.

§ 814. ¹ Formerly R. S. Sec. 5433,
35 Stat. L. 1117.

shall be fined not more than five thousand dollars, or imprisoned not more than ten years, or both.¹

§ 816. Criminal Code. Sec. 155. Secreting or Removing Tools or Material Used for Printing Bonds, Notes, Stamps, etc.

Whoever, without authority from the United States, shall secrete within, embezzle, or take and carry away from any building, room, office, apartment, vault, safe, or other place where the same is kept, used, employed, placed, lodged, or deposited by authority of the United States, any bedpiece, bedplate, roll, plate, die, seal, type, or other tool, implement, or thing used or fitted to be used in stamping or printing, or in making some other tool or implement used or fitted to be used in stamping or printing, any kind or description of bond, bill, note, certificate, coupon, postage stamp, revenue stamp, fractional currency note, or other paper, instrument, obligation, device, or document, now or hereafter authorized by law to be printed, stamped, sealed, prepared, issued, uttered, or put in circulation on behalf of the United States; or whoever, without such authority, shall so secrete, embezzle, or take and carry away any paper, parchment, or other material prepared and intended to be used in the making of any such papers, instruments, obligations, devices, or documents; or whoever, without such authority, shall so secrete, embezzle, or take and carry away any paper, parchment, or other material printed or stamped, in whole or part, and intended to be prepared, issued, or put in circulation on behalf of the United States as one of the papers, instruments, or obligations hereinbefore named, or printed or stamped, in whole or part, in the similitude of any such paper, instrument, or obligation, whether intended to issue or put the same in circulation or not, shall be fined not more than five thousand dollars, or imprisoned not more than ten years, or both.¹

§ 817. Criminal Code. Sec. 156. Counterfeiting Notes, Bonds, etc., of Foreign Governments.

Whoever, within the United States or any place subject to the jurisdiction thereof, with intent to defraud, shall

§ 815. ¹ Formerly R. S. Sec. 5434,
35 Stat. L. 1117.

§ 816. ¹ Formerly R. S. Sec. 5453,
35 Stat. L. 1117.

falsely make, alter, forge, or counterfeit any bond, certificate, obligation, or other security in imitation of, or purporting to be in imitation of any bond, certificate, obligation, or other security of any foreign government, issued or put forth under the authority of such foreign government, or any treasury note, bill, or promise to pay issued by such foreign government, and intended to circulate as money, either by law, order, or decree of such foreign government; or whoever shall cause or procure to be so falsely made, altered, forged, or counterfeited, or shall knowingly aid or assist in making, altering, forging, or counterfeiting, any such bond, certificate, obligation, or other security, or any such treasury note, bill, or promise to pay, intended as aforesaid to circulate as money, shall be fined not more than five thousand dollars and imprisoned not more than five years.¹

This section is a valid exercise of authority under the Constitution, Article 1, Section 8, Clause 10.² All persons who aid or abet are principals.³

§ 818. Criminal Code. Sec. 157. Passing Such Forged Notes, Bonds, etc.

Whoever, within the United States or any place subject to the jurisdiction thereof, knowingly and with intent to defraud, shall utter, pass, or put off, in payment or negotiation, any false, forged, or counterfeited bond, certificate, obligation, security, treasury note, bill, or promise to pay, mentioned in the section last preceding, whether the same was made, altered, forged, or counterfeited within the United States or not, shall be fined not more than three thousand dollars and imprisoned not more than three years.¹

§ 819. Criminal Code. Sec. 158. Counterfeiting Notes of Foreign Banks.

Whoever, within the United States or any place subject to the jurisdiction thereof, with intent to defraud, shall falsely make, alter, forge, or counterfeit or cause or procure

§ 817. ¹ 2 Fed. Stat. Annot. 315.

³ Bliss v. United States, 105 Fed.

² United States v. Arjona, 120 U.

508, 44 C. C. A. 324 (1st Cir.).

S. 479, 30 L. ed. 728, 7 S. C. 628.

§ 818. ¹ 35 Stat. L. 1118.

to be so falsely made, altered, forged, or counterfeited, or shall knowingly aid and assist in the false making, altering, forging, or counterfeiting of any bank note or bill issued by a bank or corporation of any foreign country, and intended by the law or usage of such foreign country to circulate as money, such bank or corporation being authorized by the laws of such country, shall be fined not more than two thousand dollars and imprisoned not more than two years.¹

§ 820. Criminal Code. Sec. 159. Passing Such Counterfeit Bank Notes.

Whoever, within the United States or any place subject to the jurisdiction thereof, shall utter, pass, put off, or tender in payment, with intent to defraud, any such false, forged, altered, or counterfeited bank note or bill, as mentioned in the preceding section, knowing the same to be so false, forged, altered, and counterfeited, whether the same was made, forged, altered, or counterfeited within the United States or not, shall be fined not more than one thousand dollars and imprisoned not more than one year.¹

§ 821. Criminal Code. Sec. 160. Having in Possession Such Forged Notes, Bonds, etc.

Whoever, within the United States or any place subject to the jurisdiction thereof, shall have in his possession any false, forged, or counterfeit bond, certificate, obligation, security, treasury note, bill, promise to pay, bank note or bill issued by a bank or corporation of any foreign country, with intent to utter, pass, or put off the same, or to deliver the same to any other person with intent that the same may thereafter be uttered, passed, or put off as true, or shall knowingly deliver the same to any other person with such intent, shall be fined not more than one thousand dollars and imprisoned not more than one year.¹

§ 822. Criminal Code. Sec. 161. Having Unlawfully in Possession or Using Plates for Such Notes, Bonds, etc.

Whoever, within the United States or any place subject to the jurisdiction thereof, except by lawful authority, shall

§ 819. ¹ 35 Stat. L. 1118.

§ 821. ¹ 35 Stat. L. 1118.

§ 820. ¹ 35 Stat. L. 1118.

have control, custody, or possession of any plate, stone, or other thing, or any part thereof, from which has been printed or may be printed any counterfeit note, bond, obligation, or other security, in whole or in part, of any foreign government, bank, or corporation, or shall use such plate, stone, or other thing, or knowingly permit or suffer the same to be used in counterfeiting such foreign obligations, or any part thereof; or whoever shall make or engrave, or cause or procure to be made or engraved, or shall assist in making or engraving, any plate, stone, or other thing, in the likeness or similitude of any plate, stone, or other thing designated for the printing of the genuine issues of the obligations of any foreign government, bank, or corporation; or whoever shall print, photograph, or in any other manner make, execute, or sell, or cause to be printed, photographed, made, executed, or sold, or shall aid in printing, photographing, making, executing, or selling, any engraving, photograph, print, or impression in the likeness of any genuine note, bond, obligation, or other security, or any part thereof, of any foreign government, bank, or corporation; or whoever shall bring into the United States or any place subject to the jurisdiction thereof, any counterfeit plate, stone, or other thing, or engraving, photograph, print, or other impressions of the notes, bonds, obligations, or other securities of any foreign government, bank, or corporation, shall be fined not more than five thousand dollars, or imprisoned not more than five years, or both.¹

§ 823. Criminal Code. Sec. 162. Connecting Parts of Different Instruments.

Whoever shall so place or connect together different parts of two or more notes, bills, or other genuine instruments issued under the authority of the United States, or by any foreign government, or corporation, as to produce one instrument, with intent to defraud, shall be deemed guilty of forgery in the same manner as if the parts so put together were falsely made or forged, and shall be fined not more than one thousand dollars, or imprisoned not more than five years, or both.¹

§ 822. ¹ 35 Stat. L. 1118.

§ 823. ¹ 35 Stat. L. 1119.

§ 824. Criminal Code. Sec. 163. Counterfeiting Gold or Silver Coins or Bars.

Whoever shall falsely make, forge, or counterfeit, or cause or procure to be falsely made, forged, or counterfeited, or shall willingly aid or assist in falsely making, forging, or counterfeiting any coin or bars in resemblance or similitude of the gold or silver coins or bars which have been, or hereafter may be, coined or stamped at the mints and assay offices of the United States, or in resemblance or similitude of any foreign gold or silver coin which by law is, or hereafter may be, current in the United States, or are in actual use and circulation as money within the United States; or whoever shall pass, utter, publish, or sell, or attempt to pass, utter, publish, or sell, or bring into the United States or any place subject to the jurisdiction thereof, from any foreign place, knowing the same to be false, forged, or counterfeit, with intent to defraud any body politic or corporate, or any person or persons whomsoever, or shall have in his possession any such false, forged, or counterfeited coin or bars, knowing the same to be false, forged, or counterfeited, with intent to defraud any body politic or corporate, or any person or persons whomsoever, shall be fined not more than five thousand dollars and imprisoned not more than ten years.¹

The Penal Code reenacted the provisions of Section 5457, but omitted the words "by imprisonment *at hard labor*." Section 338 of the Penal Code provides that the omission of the words "hard labor" does not deprive the Court of the power to impose "hard labor" if this right existed before. This omission, therefore, does not deprive the Court of the power to sentence to hard labor.² In an indictment for possessing and passing counterfeit notes and obligations it is sufficient to allege that they were "United States Notes" (*i.e.* greenbacks) of a certain denomination. This is sufficient to advise the defendant of the charge against him and identifies the forged or counterfeit instrument.³ This section makes three separate classes of acts

§ 824. ¹ Formerly R. S. Sec. 5457, 35 Stat. L. 1119.

² *United States v. Howell*, 64 Fed. 110.

³ *Linningen v. Morgan*, 241 Fed. 645, 154 C. C. A. 403 (8th Cir.).

the equivalent of each other as offenses punishable in the same manner, viz.: 1. The *making* of false coins, 2. The *passing* of them, 3. Having them in possession. The adverb "falsely" applies to the verb "*make*" — these two words taken together equal "forge" and "counterfeit" within the meaning of the section. That is, *forging or counterfeiting a coin* is the same as *falsely making* a coin and all three are equivalent.⁴ The coins in evidence must bear such a resemblance to the genuine money as to render them capable of being used to deceive a person of ordinary intelligence. The ingredients of the offense are (1) the *act* of making a false coin capable of being circulated as genuine; and (2) the *intent* to defraud; which allegation need not be made if it is alleged that the coins were "falsely" made.⁵ A State statute providing for the punishment of the counterfeiting of coins does not conflict with the Judiciary Act, Section 11 providing for exclusive cognizance by the United States Courts of all offenses against the laws of the United States and comes within the reading of this section providing against depriving the State Courts of such powers,⁶ but it is doubtful whether this is the rule now.⁷

§ 825. Criminal Code. Sec. 164. Counterfeiting Minor Coins.

Whoever shall falsely make, forge, or counterfeit, or cause or procure to be falsely made, forged, or counterfeited, or shall willingly aid or assist in falsely making, forging, or counterfeiting any coin in the resemblance or similitude of any of the minor coins which have been, or hereafter may be, coined at the mints of the United States; or whoever shall pass, utter, publish, or sell, or bring into the United States or any place subject to the jurisdiction thereof, from any foreign place, or have in his possession any such false, forged, or counterfeited coin, with intent to defraud any person whomsoever, shall be fined not more than one thousand dollars and imprisoned not more than three years.¹

⁴ *Kaye v. United States*, 177 Fed. 147, 100 C. C. A. 567 (7th Cir.).

⁵ *Bænder v. United States*, 260 Fed. 832 (C. C. A. 9th Cir.); *United States v. Otey*, 31 Fed. 68; *United States v. Abrams*, 18 Fed. 823.

⁶ *Ex parte Geisler*, 50 Fed. 411.

⁷ *Compare*: Section 256 of the Federal Judicial Code.

§ 825. ¹ Formerly R. S. Sec. 5458, 35 Stat. L. 1119.

The averment that the forged coin was passed with intent to defraud some person or persons, is sufficient notice to the defendant without specifying the name of the person to whom the coin was passed; and such an indictment is good.² In a case arising under this section, the court examined the evidence and held it sufficient to justify a verdict of guilty.³ A general verdict is sufficient to sustain all counts of the indictment. A verdict of "guilty on the first count for having in possession counterfeit coin" was held to be a general verdict.⁴ To show criminal intent it is admissible to introduce in evidence molds, etc., used in making coins of other denominations.⁵

§ 826. Criminal Code. Sec. 165. Falsifying, Mutilating, or Lightening Coinage.

Whoever, fraudulently, by any art, way, or means, shall deface, mutilate, impair, diminish, falsify, scale, or lighten, or cause or procure to be fraudulently defaced, mutilated, impaired, diminished, falsified, scaled, or lightened, or willingly aid or assist in fraudulently defacing, mutilating, impairing, diminishing, falsifying, scaling, or lightening, the gold or silver coins which have been, or which may hereafter be, coined at the mints of the United States, or any foreign gold or silver coins which are by law made current or are in actual use or circulation as money within the United States or in any place subject to the jurisdiction thereof; or whoever shall pass, utter, publish, or sell, or attempt to pass, utter, publish, or sell, or bring into the United States or any place subject to the jurisdiction thereof, from any foreign place, knowing the same to be defaced, mutilated, impaired, diminished, falsified, scaled, or lightened, with intent to defraud any person whomsoever, or shall have in his possession any such defaced, mutilated, impaired, diminished, falsified, scaled, or lightened coin, knowing the same to be defaced, mutilated, impaired, diminished, falsified, scaled, or lightened, with intent to defraud any person whomsoever, shall be fined not more

² *United States v. Bejandio*, 1 Woods, 294, Fed. Cas. No. 14561.

³ *Riggio v. United States*, 223 Fed. 529, 139 C. C. A. 77 (2d Cir.).

⁴ *Statler v. United States*, 157 U. S. 277, 39 L. ed. 700, 15 S. C. 616.

⁵ *Bryan v. United States*, 133 Fed. 495, 66 C. C. A. 369 (5th Cir.).

than two thousand dollars and imprisoned not more than five years.¹

Mutilating a silver coin by means of punching a hole in it, but not removing any silver therefrom, is not an act of counterfeiting.² The power to coin money and regulate the value thereof is a prerogative of the sovereign power and as an incident thereto the Government may punish defacement and mutilation.³

§ 827. Criminal Code. Sec. 166. Debasement of Coinage by Officers of the Mint.

If any of the gold or silver coins struck or coined at any of the mints of the United States shall be debased, or made worse as to the proportion of fine gold or fine silver therein contained, or shall be of less weight or value than the same ought to be, pursuant to law, or if any of the scales or weights used at any of the mints or assay offices of the United States shall be defaced, altered, increased, or diminished through the fault or connivance of any officer or person employed at the said mints or assay offices, with a fraudulent intent; or if any such officer or person shall embezzle any of the metals at any time committed to his charge for the purpose of being coined, or any of the coins struck or coined at the said mints, or any medals, coins, or other moneys of said mints or assay offices at any time committed to his charge, or of which he may have assumed the charge, every such officer or person who commits any of the said offenses shall be fined not more than ten thousand dollars and imprisoned not more than ten years.¹

One who feloniously takes gold metal from a United States mint may be charged in one count with larceny and in another with embezzlement under this section.²

§ 826. ¹ Formerly R. S. Sec. 5459, 35 Stat. L. 1119.

² United States v. Lissner, 12 Fed. 840.

³ Ling Su Fan v. United States, 218 U. S. 302, 54 L. ed. 1049, 31 S. C. 21.

§ 827. ¹ Formerly R. S. Sec. 5460, 35 Stat. L. 1120.

² United States v. Jones, 69 Fed. 973.

§ 828. Criminal Code. Sec. 167. Making or Uttering Coins in Resemblance of Money.

Whoever, except as authorized by law, shall make or cause to be made, or shall utter or pass, or attempt to utter or pass, any coins of gold or silver or other metal, or alloys of metals, intended for the use and purpose of current money, whether in the resemblance of coins of the United States or of foreign countries, or of original design, shall be fined not more than three thousand dollars, or imprisoned not more than five years, or both.¹

The intent in making the counterfeit money is immaterial.² Where the defendant passed certain pieces of metal, apparently gold, octagon in form, on one side of which was the device of an Indian, and on the other the inscription " $\frac{1}{4}$ dollar, Cal." he cannot be convicted of passing counterfeit money as the coin does not purport to be an imitation of any coin known to the law.³

§ 829. Criminal Code. Sec. 168. Making or Issuing Devices of Minor Coins.

Whoever, not lawfully authorized, shall make, issue, or pass, or cause to be made, issued, or passed, any coin, card, token, or device in metal, or its compounds, which may be intended to be used as money for any one-cent, two-cent, three-cent, or five-cent piece, now or hereafter authorized by law, or for coins of equal value, shall be fined not more than one thousand dollars and imprisoned not more than five years.¹

The indictment need not state the facts going to prove the intent to defraud.² Evidence that defendant had molds for making twenty-five-cent pieces is admissible on the trial of an indictment charging possession of molds for making five-cent

§ 828. ¹ Formerly R. S. Sec. 5461, 35 Stat. L. 1120.

² *Kaye v. United States*, 177 Fed. 147, 100 C. C. A. 567 (7th Cir.). *Distinguished in Bænder v. United States*, 260 Fed. 832 (C. C. A. 9th Cir.).

³ *United States v. Bogart*, 9 Ben. 314, Fed. Cas. No. 14617.

§ 829. ¹ Formerly R. S. Sec. 5462, 35 Stat. L. 1120.

² *McCarty v. United States*, 101 Fed. 113, 41 C. C. A. 242 (8th Cir.). A criminal intent is inferred from the possession of the dies and tools. *Bænder v. United States*, 260 Fed. 832 (C. C. A. 9th Cir.).

pieces with intent to defraud. This is admissible to show intent.³ One need not make those coins for defrauding some one in order to be guilty of this offense. The making of such coins is sufficient guilt.⁴ Issuing coins of a similar color to those of the Government, but of a different size and of only one fifth the weight and bearing the name of a business concern is not within the statutes.⁵

§ 830. Criminal Code. Sec. 169. Counterfeiting, etc., Dies for Coins of United States.

Whoever, without lawful authority, shall make, or cause or procure to be made, or shall willingly aid or assist in making, any die, hub, or mold, or any part thereof, either of steel or plaster, or any other substance whatsoever, in likeness or similitude, as to the design or the inscription thereon, of any die, hub, or mold designated for the coining or making of any of the genuine gold, silver, nickel, bronze, copper, or other coins of the United States, that have been or hereafter may be coined at the mints of the United States; or whoever, without lawful authority, shall have in his possession any such die, hub, or mold, or any part thereof; or shall permit the same to be used for or in aid of the counterfeiting of any of the coins of the United States hereinbefore mentioned, shall be fined not more than five thousand dollars and imprisoned not more than ten years.¹

Charging the defendant in an indictment with "unlawfully and feloniously" having in his possession certain dies, etc.,² "with the intent to fraudulently use the same" is sufficient. An indictment charging the defendant with having in his possession molds for coining counterfeit silver dollars with intent to defraud is a good indictment, the pleader never being required in this class of cases to set out the evidence or facts going to prove the intent to defraud.³ The making of counterfeiting implements

³ *Bryan v. United States*, 133 Fed. 495, 66 C. C. A. 369 (5th Cir.).

⁴ *Kaye v. United States*, 177 Fed. 147, 100 C. C. A. 567 (7th Cir.).

⁵ *United States v. Roussopoulos*, 95 Fed. 977.

§ 830. ¹ 35 Stat. L. 1120.

² *Wroclawsky v. United States*, 183 Fed. 312, 105 C. C. A. 524 (7th Cir.).

³ *McCarty v. United States*, 101 Fed. 113, 41 C. C. A. 242 (8th Cir.).

is inherently wrong, and it was proper for Congress to make it an offense.⁴

§ 831. Criminal Code. Sec. 170. Counterfeiting, etc., Dies for Foreign Coins.

Whoever, within the United States or any place subject to the jurisdiction thereof, without lawful authority, shall make, or cause or procure to be made, or shall willingly aid or assist in making, any die, hub, or mold, or any part thereof, either of steel or of plaster, or of any other substance whatsoever, in the likeness or similitude, as to the design or the inscription thereon, of any die, hub, or mold designated for the coining of the genuine coin of any foreign government; or whoever, without lawful authority, shall have in his possession any such die, hub, or mold, or any part thereof, or shall conceal, or knowingly suffer the same to be used for the counterfeiting of any foreign coin, shall be fined not more than two thousand dollars, or imprisoned not more than five years, or both.¹

§ 832. Criminal Code. Sec. 171. Making, Importing, or Having in Possession Tokens, Prints, etc., Similar to United States or Foreign Coins.

Whoever, within the United States or any place subject to the jurisdiction thereof, shall make, or cause or procure to be made, or shall bring therein, from any foreign country, or shall have in possession with intent to sell, give away, or in any other manner use the same, any business or professional card, notice, placard, token, device, print, or impression, or any other thing whatsoever, in the likeness or similitude as to design, color, or the inscription thereon, of any of the coins of the United States or of any foreign country that have been or hereafter may be issued as money, either under the authority of the United States or under the authority of any foreign government, shall be fined not more than one hundred dollars. But nothing in this section shall be construed to forbid or prevent the printing and publishing of illustrations of coins and

⁴ *Kaye v. United States*, 177 Fed. 147, 150, 100 C. C. A. 567 (7th Cir.).

§ 831. ¹ 35 Stat. L. 1120.

medals, or the making of the necessary plates for the same, to be used in illustrating numismatic and historical books and journals and the circulars of legitimate publishers and dealers in the same.¹

Metal tokens which resemble United States coins but cannot possibly be mistaken for them do not come within the above section.² The words "device, print, or impression, or any other thing whatsoever" do not include counterfeit molds or coins.³

§ 833. Criminal Code. Sec. 172. Counterfeit Obligations, Securities, Coins, or Material for Counterfeiting, to Be Forfeited.

All counterfeits of any obligation or other security of the United States or of any foreign government, or counterfeits of any of the coins of the United States or of any foreign government, and all material or apparatus fitted or intended to be used, or that shall have been used, in the making of any such counterfeit obligation or other security or coins hereinbefore mentioned, that shall be found in the possession of any person without authority from the Secretary of the Treasury or other proper officer to have the same, shall be taken possession of by any authorized agent of the Treasury Department and forfeited to the United States, and disposed of in any manner the Secretary of the Treasury may direct. Whoever having the custody or control of any such counterfeits, material, or apparatus shall fail or refuse to surrender possession thereof upon request by any such authorized agent of the Treasury Department, shall be fined not more than one hundred dollars, or imprisoned not more than one year, or both.¹

§ 834. Criminal Code. Sec. 173. Issue for Search Warrant for Suspected Counterfeits, etc. ; Forfeiture.

The several judges of courts established under the laws of the United States and United States commissioners may, upon proper oath or affirmation, within their respec-

¹ § 832. ¹ 35 Stat. L. 1121.

³ *Kaye v. United States*, 177 Fed.

² *United States v. Roussopoulos*, 95 Fed. 977. *See also United States v. Van Auken*, 96 U. S. 366, 24 L. ed. 852.

147, 100 C. C. A. 567 (7th Cir.).

¹ § 833. ¹ 35 Stat. L. 1121.

tive jurisdictions, issue a search warrant authorizing any marshal of the United States, or any other person specially mentioned in such warrant, to enter any house, store, building, boat, or other place named in such warrant, in which there shall appear probable cause for believing that the manufacture of counterfeit money, or the concealment of counterfeit money, or the manufacture or concealment of counterfeit obligations or coins of the United States or of any foreign government, or the manufacture or concealment of dies, hubs, molds, plates, or other things fitted or intended to be used for the manufacture of counterfeit money, coins, or obligations of the United States or of any foreign government, or of any bank doing business under the authority of the United States or of any State or Territory thereof, or of any bank doing business under the authority of any foreign government, or of any political division of any foreign government, is being carried on or practiced, and there search for any such counterfeit money, coins, dies, hubs, molds, plates, and other things, and for any such obligations, and if any such be found, to seize and secure the same and to make return thereof to the proper authority; and all such counterfeit money, coins, dies, hubs, molds, plates, and other things, and all such counterfeit obligations so seized shall be forfeited to the United States.¹

This section is intended to aid in counterfeiting cases and does not apply to violations of postal regulations, etc.²

§ 835. Criminal Code. Sec. 174. Circulating Bills of Expired Corporations.

In all cases where the charter of any corporation which has been or may be created by Act of Congress has expired or may hereafter expire, if any director, officer, or agent of the corporation, or any trustee thereof, or any agent of such trustee, or any person having in his possession or under his control the property of the corporation for the purpose of paying or redeeming its notes and obligations, shall knowingly issue, reissue, or utter as money, or in any other way knowingly put in circulation any bill, note, check, draft, or other security purporting to have been made by any such corporation whose charter has expired, or by any officer

§ 834. ¹ 35 Stat. L. 1121.

² United States v. Jones, 230 Fed. 262.

thereof, or purporting to have been made under authority derived therefrom, or if any person shall knowingly aid in any such act, he shall be fined not more than ten thousand dollars, or imprisoned not more than five years, or both. But nothing herein shall be construed to make it unlawful for any person, not being such director, officer, or agent of the corporation, or any trustee hereof, or any agent of such trustee, or any person having in his possession or under his control the property of the corporation for the purpose hereinbefore set forth, who has received or may hereafter receive such bill, note, check, draft, or other security, *bona fide* and in the ordinary transactions of business, to utter as money or otherwise circulate the same.¹

§ 836. Criminal Code. Sec. 175. Imitating National Bank Notes with Printed Advertisements Thereon.

It shall not be lawful to design, engrave, print, or in any manner make or execute, or to utter, issue, distribute, circulate, or use any business or professional card, notice, placard, circular, handbill, or advertisement in the likeness or similitude of any circulating note or other obligation or security of any banking association organized or acting under the laws of the United States which has been or may be issued under any Act of Congress, or to write, print, or otherwise impress upon any such note, obligation, or security, any business or professional card, notice, or advertisement, or any notice or advertisement of any matter or thing whatever. Whoever shall violate any provision of this section shall be fined not more than one hundred dollars, or imprisoned not more than six months, or both.¹

An offender under this section can only be punished in a *qui tam* action.²

§ 837. Criminal Code. Sec. 176. Mutilating or Defacing National Bank Notes.

Whoever shall mutilate, cut, deface, disfigure, or perforate with holes, or unite or cement together, or do

§ 835. ¹ Formerly R. S. Sec. 5437,
35 Stat. L. 1122.

² United States v. Laescki, 29
Fed. 699.

§ 836. ¹ Formerly R. S. Sec. 5188,
35 Stat. L. 1122.

any other thing to any bank bill, draft, note, or other evidence of debt, issued by any national banking association, or shall cause or procure the same to be done, with intent to render such bank bill, draft, note, or other evidence of debt unfit to be reissued by said association, shall be fined not more than one hundred dollars, or imprisoned not more than six months, or both.¹

The Government may punish defacement and mutilation and constitute any such act, when fraudulently done, a misdemeanor.²

§ 838. Criminal Code. Sec. 177. Imitating United States Securities or Printing Business Cards on Them.

It shall not be lawful to design, engrave, print, or in any manner make or execute, or to utter, issue, distribute, circulate, or use any business or professional card, notice, placard, circular, handbill, or advertisement, in the likeness or similitude of any bond, certificate of indebtedness, certificate of deposit, coupon, United States note, Treasury note, gold certificate, silver certificate, fractional note, or other obligation or security of the United States which has been or may be issued under or authorized by any Act of Congress heretofore passed or which may hereafter be passed; or to write, print, or otherwise impress upon any such instrument, obligation, or security, any business or professional card, notice, or advertisement, or any notice or advertisement of any matter or thing whatever. Whoever shall violate any provision of this section shall be fined not more than five hundred dollars.¹

§ 839. Criminal Code. Sec. 178. Notes of Less than One Dollar Not to Be Issued.

No person shall make, issue, circulate, or pay out any note, check, memorandum, token, or other obligation for a less sum than one dollar, intended to circulate as money or to be received or used in lieu of lawful money of the United States; and every person so offending shall be fined

§ 837. ¹ Formerly R. S. Sec. 5189,
35 Stat. L. 1122.

§ 838. ¹ Formerly R. S. Sec. 3708,
35 Stat. L. 1122.

² *Ling Su Fan v. United States*, 218
U. S. 302, 54 L. ed. 1049, 31 S. C. 21.

not more than five hundred dollars, or imprisoned not more than six months, or both.¹

A note payable in merchandise is not within the statute.² Where the promise is to pay in merchandise and the coin is so dissimilar to that of the Government that even careless and illiterate persons will not be misled, there is no violation of the statute.³ The issuing of paper tickets by the defendant company having on their face "Monongahela Bridge — good for one trip" with the name of the collector of tolls added, is not in violation of the statute.⁴

§ 839. ¹ Formerly R. S. Sec. 3583, 35 Stat. L. 1122.

² *United States v. Van Auken*, 96 U. S. 366, 24 L. ed. 852. *See also* *Hollister v. Zion's Co-operative Mercantile Institution*, 111 U. S. 62, 28 L. ed. 352, 4 S. C. 263, 265; *In re*

Aldrich, 16 Fed. 369; *United States v. White*, 19 Fed. 723.

³ *United States v. Roussopulous*, 95 Fed. 977.

⁴ *United States v. Monongahela Bridge Co.*, 2 Pitts. Rep. 475, Fed. Cas. No. 15796.

CHAPTER LIII

CRIMINAL CODE, CHAPTER EIGHT

OFFENSES AGAINST THE POSTAL SERVICE

- § 840. Crim. Code § 179. Conducting Post Office without Authority.
- § 841. Crim. Code § 180. Illegal Carrying of Mail by Carriers and Others.
- § 842. Crim. Code § 181. Conveyance of Mail by Private Express Forbidden.
- § 843. Crim. Code § 182. Transporting Persons Unlawfully Conveying Mail.
- § 844. Crim. Code § 183. Sending Letters by Private Express.
- § 845. Crim. Code § 184. Conveying of Letters over Post Routes.
- § 846. Crim. Code § 185. Carrying Letters Out of the Mail on Board of Vessel.
- § 847. Crim. Code § 186. When Conveying of Letters by Private Persons Is Lawful.
- § 848. Crim. Code § 187. Wearing Uniform of Carrier without Authority.
- § 849. Crim. Code § 188. Vehicles, etc., Claiming to Be Mail Carriers.
- § 850. Crim. Code § 189. Injuring Mail Bags, etc.
- § 851. Crim. Code § 190. Stealing Post Office Property.
- § 852. Crim. Code § 191. Stealing or Forging Mail Locks or Keys.
- § 853. Crim. Code § 192. Breaking into and Entering Post Office.
- § 854. Crim. Code § 193. Unlawfully Entering Postal Car, etc.
- § 855. Crim. Code § 194. Stealing, Secreting, Embezzling, etc., Mail Matter or Contents.
- § 856. Crim. Code § 195. Postmaster or Employee of Postal Service Detaining, Destroying, or Embezzling Letters, etc.
- § 857. Crim. Code § 196. Postmaster, etc., Detaining or Destroying Newspapers.
- § 858. Crim. Code § 197. Assaulting Mail Carrier with Intent to Rob, and Robbing Mail.
- § 859. Crim. Code § 198. Injuring Letter Boxes or Mail Matter; Assaulting Carrier, etc.
- § 860. Crim. Code § 199. Deserting the Mail.
- § 861. Crim. Code § 200. Delivery of Letters by Master of Vessel.
- § 862. Crim. Code § 201. Obstructing the Mail.

- § 863. Crim. Code § 202. Ferryman Delaying the Mail.
§ 864. Crim. Code § 203. Letters Carried in a Foreign Vessel to Be Deposited in a Post Office.
§ 865. Crim. Code § 204. Vessels to Deliver Letters at Post Office; Oath.
§ 866. Crim. Code § 205. Using, Selling, etc., Canceled Stamps; Removing Cancellation Marks from Stamps, etc.
§ 867. Crim. Code § 206. False Returns to Increase Compensation.
§ 868. Crim. Code § 207. Collection of Unlawful Postage Forbidden.
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§ 871. Crim. Code § 210. Issuing Money Order without Payment.
§ 872. Crim. Code § 211. Obscene, etc., Matter Non-mailable.
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§ 875. Crim. Code § 214. Postmasters Not to Be Lottery Agents.
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§ 879. Crim. Code § 218. Counterfeiting Money Orders.
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§ 882. Crim. Code § 221. Inclosing Higher Class in Lower Class Matter.
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§ 884. Crim. Code § 223. False Evidence as to Second-class Matter.
§ 885. Crim. Code § 224. Inducing or Prosecuting False Claims.
§ 886. Crim. Code § 225. Misappropriation of Postal Funds or Property.
§ 887. Crim. Code § 226. Employees Not to Become Interested in Contracts.
§ 888. Crim. Code § 227. Fraudulent Use of Official Envelopes.
§ 889. Crim. Code § 228. Fraudulent Increase of Weight of Mail.
§ 890. Crim. Code § 229. Offenses against Foreign Mail in Transit.
§ 891. Crim. Code § 230. Omission to Take Oath.
§ 892. Crim. Code § 231. Definitions.

§ 840. Criminal Code. Sec. 179. Conducting Post Office without Authority.

Whoever, without authority from the Postmaster-General, shall set up or profess to keep any office or place of business bearing the sign, name, or title of post office, shall be fined not more than five hundred dollars.¹

§ 840. ¹ Formerly R. S. Sec. 3829, 35 Stat. L. 1123.

§ 841. Criminal Code. Sec. 180. Illegal Carrying of Mail by Carriers and Others.

Whoever, being concerned in carrying the mail, shall collect, receive, or carry any letter or packet, or cause or procure the same to be done, contrary to law, shall be fined not more than fifty dollars, or imprisoned not more than thirty days, or both.¹

The word "letter" will be interpreted according to its ordinary and common meaning. And the main purpose need not be for the carriage of mails, it being sufficient if a letter was carried; but if it is a letter incidental to the business, such as an express receipt or a power of attorney, it does not come within the section.² The word "packet" is a written communication of four or more sheets;³ but packets containing articles other than letters are not within the prohibition of the statute and therefore a packet containing only executions is not included.⁴

§ 842. Criminal Code. Sec. 181. Conveyance of Mail by Private Express Forbidden.

Whoever shall establish any private express for the conveyance of letters or packets, or in any manner cause or provide for the conveyance of the same by regular trips or at stated periods over any post route which is or may be established by law, or from any city, town, or place, to any other city, town, or place, between which the mail is regularly carried, or whoever shall aid or assist therein shall be fined not more than five hundred dollars, or imprisoned not more than six months, or both: *Provided*, That nothing contained in this section shall be construed as prohibiting any person from receiving and delivering to the nearest post office, postal car, or other authorized depository for mail matter, any mail matter properly stamped.¹

§ 841. ¹ Formerly R. S. Sec. 3981, 35 Stat. L. 1123.

² United States v. Thompson, Fed. Cas. No. 16489.

³ Williams v. Wells Fargo & Co. Express, 177 Fed. 352, 357, 101 C. C. A. 328 (8th Cir.).

⁴ United States v. Chaloner, 1 Ware, 214, Fed. Cas. No. 14777. See Williams v. Wells Fargo & Co. Express, *supra*.

§ 842. ¹ Formerly R. S. Sec. 3982, 35 Stat. L. 1123.

Congress has the constitutional power to reserve to the postal department a monopoly of the business of receiving, transmitting, and delivering mails and may therefore enact rules and regulations to preserve this monopoly, but this monopoly extends to letters and packets of letters and not to the transportation of merchandise weighing less than four pounds. A suit to recover a penalty for the alleged violation of this section is maintainable only in the name of the United States and not in the name of the informer.² Letter carrier routes are post routes within the meaning of this section — a *postal route* is an appointed course or prescribed line of mail transportation, and therefore the streets of New York City are post routes. Collecting letters by special messengers and then, after sorting them out, distributing them once, twice, or three times a day are “deliveries by regular trips and at stated periods” within this section and not a conveyance of letters “by special messenger for the particular occasion.”³

§ 843. Criminal Code. Sec. 182. Transporting Persons Unlawfully Conveying Mail.

Whoever, being the owner, driver, conductor, master, or other person having charge of any stagecoach, railway car, steamboat, or other vehicle or vessel, shall knowingly convey or knowingly permit the conveyance of any person acting or employed as a private express for the conveyance of letters or packets, and actually in possession of the same for the purpose of conveying them, contrary to law, shall be fined not more than one hundred and fifty dollars.¹

§ 844. Criminal Code. Sec. 183. Sending Letters by Private Express.

Whoever shall transmit by private express or other unlawful means, or deliver to any agent thereof, or deposit or cause to be deposited at any appointed place, for the

² *Williams v. Wells Fargo & Co. Express*, 177 Fed. 352, 101 C. C. A. 328 (8th Cir.), 35 L. R. A. (N. S.) 1034, 21 Ann. Cas. 699. But see act creating Parcel Post System.

³ *United States v. Easson*, 18 Fed. 590; *Blackham v. Gresham*, 16 Fed. 609.

§ 843. ¹ Formerly R. S. Sec. 3983, 35 Stat. L. 1124.

purpose of being so transmitted, any letter or packet, shall be fined not more than fifty dollars.¹

§ 845. Criminal Code. Sec. 184. Conveying of Letters over Post Routes.

Whoever, being the owner, driver, conductor, master, or other person having charge of any stagecoach, railway car, steamboat, or conveyance of any kind which regularly performs trips at stated periods on any post route, or from any city, town, or place to any other city, town, or place between which the mail is regularly carried, and which shall carry, otherwise than in the mail, any letters or packets, except such as relate to some part of the cargo of such steamboat or other vessel, to the current business of the carrier, or to some article carried at the same time by the same stagecoach, railway car, or other vehicle, except as otherwise provided by law, shall be fined not more than fifty dollars.¹

Letters of a railroad company to officers of a telegraph company, with which it was under contract and in whose business it participated, relating to immediate and day by day action, is current, as distinguished from exceptional business and falls within the permitted exceptions of this section.² Knowledge on the part of the carrier is essential to make it liable under this section.³ A person sending such a package of letters in a railroad car without the knowledge or consent of the railroad under the act of March 3, 1825, was not liable to prosecution.⁴

§ 846. Criminal Code. Sec. 185. Carrying Letters Out of the Mail on Board of Vessel.

Whoever shall carry any letter or packet on board any vessel which carries the mail, otherwise than in such mail, except as otherwise provided by law, shall be fined not more

§ 844. ¹ Formerly R. S. Sec. 3984, 35 Stat. L. 1124.

§ 845. ¹ Formerly R. S. Sec. 3985, 35 Stat. L. 1124.

² United States v. Erie Railroad Company, 235 U. S. 513, 59 L. ed. 335, 35 S. C. 193.

³ United States v. Kimball, Fed. Cas. No. 15531.

⁴ United States v. Pomeroy, Fed. Cas. No. 16065.

than fifty dollars, or imprisoned not more than one month, or both.¹

§ 847. Criminal Code. Sec. 186. When Conveying of Letters by Private Persons Is Lawful.

Nothing in this chapter shall be construed to prohibit the conveyance or transmission of letters or packets by private hands without compensation, or by special messenger employed for the particular occasion only.¹

An express company carrying merchandise cannot carry letters, even though it carries them without compensation, and comes within the prohibition of the statute.² Maintaining a corps of messengers who collected several thousands of letters daily, sorting them out, and redelivering them, was held to be within Penal Section 181 (*supra*), as they were not deliveries "by a special messenger employed for the particular occasion."³

§ 848. Criminal Code. Sec. 187. Wearing Uniform of Carrier without Authority.

Whoever, not being connected with the letter-carrier branch of the postal service, shall wear the uniform or badge which may be prescribed by the Postmaster-General to be worn by letter carriers, shall be fined not more than one hundred dollars, or imprisoned not more than six months, or both.¹

§ 849. Criminal Code. Sec. 188. Vehicles, etc., Claiming to Be Mail Carriers.

It shall be unlawful to paint, print, or in any manner to place upon or attach to any steamboat or other vessel, or any car, stagecoach, vehicle, or other conveyance, not actually used in carrying the mail, the words "United States Mail", or any words, letters, or characters of like import; or to give notice, by publishing in any newspaper or otherwise, that any steamboat or other vessel, or any car,

§ 846. ¹ Formerly R. S. Sec. 3986, 35 Stat. L. 1124.

§ 847. ¹ Formerly R. S. Sec. 3992, 35 Stat. L. 1124.

² United States v. Thompson, Fed. Cas. No. 16489.

³ United States v. Easson, 18 Fed. 590.

§ 848. ¹ Formerly R. S. Sec. 3867, 35 Stat. L. 1124.

stagecoach, vehicle, or other conveyance, is used in carrying the mail, when the same is not actually so used; and every person who shall violate, and every owner, receiver, lessee, or managing operator thereof, who shall cause, suffer, or permit the violation of any provision of this section, shall be liable, and shall be fined not more than one thousand dollars, or imprisoned not more than two years, or both.¹

§ 850. Criminal Code. Sec. 189. Injuring Mail Bags, etc.

Whoever shall tear, cut, or otherwise injure any mail bag, pouch, or other thing used or designed for use in the conveyance of the mail, or shall draw or break any staple or loosen any part of any lock, chain, or strap attached thereto, with intent to rob or steal any such mail, or to render the same insecure, shall be fined not more than five hundred dollars, or imprisoned not more than three years, or both.¹

The intent of Congress is to protect each and every bag from felonious injury. Therefore, one who, in the same transaction, tears or cuts successively mail bags of the United States, used in conveyance of the mails, with intent to rob or steal any such mail, is guilty of a separate offense under this section with each successive mail bag so cut with the criminal intent charged.² In a parallel case, but not arising under this section, it was held that one who broke into a post office and committed larceny therein may be convicted under separate counts of the same indictment and sentenced separately for the breaking into the post office and for the larceny.³

§ 851. Criminal Code. Sec. 190. Stealing Post Office Property.

Whoever shall steal, purloin, or embezzle any mail bag or other property in use by or belonging to the Post Office Department, or shall appropriate any such property to his own or any other than its proper use, or shall convey

§ 849. ¹ R. S. Sec. 3979, 35 Stat. L. 1124.

² *Ebeling v. Morgan*, 237 U. S. 625, 59 L. ed. 1151, 35 S. C. 710.

§ 850. ¹ Formerly R. S. Sec. 5476, 35 Stat. L. 1124.

³ *Morgan v. Devine*, 237 U. S. 632, 59 L. ed. 1153, 35 S. C. 712.

away any such property to the hindrance or detriment of the public service, shall be fined not more than two hundred dollars, or imprisoned not more than three years, or both.¹

Breaking into a post office with intent to commit larceny is punishable under Section 192 and the larceny is punishable under this section. These are separate offenses even though committed as parts of the same transaction.² A person breaking into a post office with the intent to commit larceny can be convicted either of larceny or for violation of this section, but not of both.³ Evidence showing that the accused broke into a post office with intent to commit larceny and actually stealing stamps and money, was reviewed, and held that an offense under this section existed.⁴ A sentence of three years' imprisonment for larceny of a rubber stamp worth forty cents was held not an abuse of discretion, in view of the statement of the trial court that accused committed perjury at the trial.⁵ The offenses created in Sections 190 and 192 of the Federal Criminal Code are separate and distinct and are punishable as such, although the evidence introduced sustains both charges.⁶

§ 852. Criminal Code. Sec. 191. Stealing or Forging Mail Locks or Keys.

Whoever shall steal, purloin, embezzle, or obtain by any false pretense, or shall aid or assist in stealing, purloining, embezzling, or obtaining by any false pretense, any key suited to any lock adopted by the Post Office Department and in use on any of the mails or bags thereof, or any key to any lock box, lock drawer, or other authorized receptacle, for the deposit or delivery of mail matter; or whoever shall knowingly and unlawfully make, forge, or

§ 851. ¹ Formerly R. S. Sec. 5475, 35 Stat. L. 1124.

² *Morgan v. Devine*, 237 U. S. 632, 59 L. ed. 1153, 35 S. C. 712; *Morgan v. Sylvester*, 231 Fed. 886, 146 C. C. A. 82 (8th Cir.).

³ *O'Brien v. McClaughry*, 209 Fed. 816, 126 C. C. A. 540 (8th Cir.); *Munson v. McClaughry*, 198 Fed. 72, 117 C. C. A. 180 (8th Cir.).

⁴ *Sorenson v. United States*, 168

Fed. 785, 96 C. C. A. 181 (8th Cir.).

⁵ *Peterson v. United States*, 246 Fed. 118, 158 C. C. A. 344 (4th Cir.). *Certiorari denied*, 246 U. S. 661, 62 L. ed. 927, 38 S. C. 332.

⁶ *Kelly v. United States*, 258 Fed. 392 — C. C. A. (6th Cir.). For a case where evidence was held sufficient to go to jury, see *Coleman v. United States*, 239 Fed. 711, 152 C. C. A. 545 (6th Cir.).

counterfeit, or cause to be unlawfully made, forged, or counterfeited, any such key, or shall have in his possession any such mail lock or key with the intent unlawfully or improperly to use, sell, or otherwise dispose of the same, or to cause the same to be unlawfully or improperly used, sold, or otherwise disposed of; or whoever, being engaged as a contractor or otherwise in the manufacture of any such mail lock or key, shall deliver or cause to be delivered, any finished or unfinished lock or key used or designed for use by the department, or the interior part of any such lock, to any person not duly authorized under the hand of the Postmaster-General and the seal of the Post Office Department, to receive the same, unless the person receiving it is the contractor for furnishing the same or engaged in the manufacture thereof in the manner authorized by the contract, or the agent of such manufacturer, shall be fined not more than five hundred dollars and imprisoned not more than ten years.¹

§ 853. Criminal Code. Sec. 192. Breaking into and Entering Post Office.

Whoever shall forcibly break into or attempt to break into any post office, or any building used in whole or in part as a post office, with intent to commit in such post office, or building, or part thereof, so used, any larceny or other depredation, shall be fined not more than one thousand dollars and imprisoned not more than five years.¹

To constitute an offense under this section there must be an intent to commit larceny or other depredation in the part of the building used as a post office. An indictment alleging an intent to commit larceny "in said building" is demurrable.² Where

§ 852. ¹ Formerly 35 Stat. L. 1125. See authorities cited under §§ 850 and 851, *supra*. *Habeas corpus* will not lie to relieve from conviction under penal Section 47 where the accused properly should have been tried under Section 192 of the same code. *Morgan, Warden v. Sylvester, et al.*, 231 Fed. 886, 146 C. C. A. 82 (8th Cir.).

§ 853. ¹ Formerly R. S. Sec. 5478, 35 Stat. L. 1125. See, also, notes under §§ 851 and 852, *supra*.

² *United States v. Campbell*, 16 Fed. 233; *United States v. Martin*, 140 Fed. 256; *Sorenson v. United States*, 168 Fed. 785, 94 C. C. A. 181 (8th Cir.).

accused offers no testimony tending to show innocent possession, recent possession of stolen goods may raise an inference of breaking and entering as well as of larceny.³ Evidence considered and held to be insufficient to sustain a conviction.⁴ Finding the accused in a building after it was closed for the night and all persons apparently excluded is *prima facie* evidence of a forcible breaking.⁵ Breaking into a building used in whole or in part as a post office with the intent to commit a larceny in the post office is a violation of this section.⁶ Breaking into a post office with intent to commit larceny, punishable under this section, and the larceny, punishable under Section 190, are separate offenses even though committed as parts of the same transaction.⁷ But a breaking into any part of a building partly used as a post office with the intent to commit larceny in the part used as a post office is within this section.⁸ A conviction under this section cannot be had where part of a building was used as a post office and there was a breaking and entering into and larceny from a part of the building not used as a post office.⁹

§ 854. Criminal Code. Sec. 193. Unlawfully Entering Postal Car, etc.

Whoever, by violence, shall enter a post-office car, or any apartment in any car, steamboat, or vessel, assigned to the use of the Mail Service, or shall willfully or maliciously assault or interfere with any postal clerk in the discharge of his duties in connection with such car, steamboat, vessel, or apartment thereof, or shall willfully aid or assist therein, shall be fined not more than one thousand dollars, or imprisoned not more than three years, or both.¹

§ 855. Criminal Code. Sec. 194. Stealing, Secreting, Embezzling, etc., Mail Matter or Contents.

Whoever shall steal, take, or abstract, or by fraud or deception obtain, from or out of any mail, post office, or

³ *Considine v. United States*, 112 Fed. 342, 50 C. C. A. 272 (6th Cir.).

⁴ *Sorenson v. United States*, 168 Fed. 785, 94 C. C. A. 181 (8th Cir.).

⁵ *United States v. Lantry*, 30 Fed. 232.

⁶ *Anderson v. Moyer*, 193 Fed. 499.

⁷ *Morgan v. Devine*, 237 U. S. 632, 59 L. ed. 1153, 35 S. C. 712.

⁸ *United States v. Saunders*, 77 Fed. 170.

⁹ *United States v. Shelton*, 100 Fed. 831.

§ 854. ¹ 35 Stat. L. 1125.

station thereof, or other authorized depository for mail matter, or from a letter or mail carrier, any letter, postal card, package, bag, or mail, or shall abstract or remove from any such letter, package, bag, or mail, any article or thing contained therein, or shall secrete, embezzle, or destroy any such letter, postal card, package, bag, or mail, or any article or thing contained therein; or whoever shall buy, receive, or conceal, or aid in buying, receiving, or concealing, or shall unlawfully have in his possession any letter, postal card, package, bag, or mail, or any article or thing contained therein, which has been so stolen, taken, embezzled, or abstracted, as herein described, knowing the same to have been so stolen, taken, embezzled, or abstracted; or whoever shall take any letter, postal card, or package, out of any post-office station thereof, or other authorized depository, or in the custody of any letter or mail carrier, before it has been delivered to the person to whom it was directed, with a design to obstruct the correspondence, or to pry into the business or secrets of another, or shall open, secrete, embezzle, or destroy the same, shall be fined not more than two thousand dollars, or imprisoned not more than five years, or both.¹

An indictment for stealing a letter need not allege the ownership or value of the property stolen.² Under the former statute, an indictment charging a taking in the language of the statute is insufficient because not charging an unlawful taking.³ An indictment charging the purchase of a draft with knowledge that it was stolen and embezzled is demurrable in that stealing and embezzling are distinct and inconsistent acts.⁴ It is not an offense under this section to take mail matter placed "on" but "outside" of a letter box.⁵ Opening a letter, with intent

§ 855. ¹ Formerly R. S. Sec. 3892, 35 Stat. L. 1125.

² *United States v. Falkenhainer*, 21 Fed. 624; *United States v. Jolly*, 37 Fed. 108; *United States v. Trosper*, 127 Fed. 476 (need not allege felonious taking); *Bowers v. United States*, 148 Fed. 379, 78 C. C. A. 193 (8th Cir.).

³ *United States v. Meyers*, 142 Fed. 907.

⁴ *United States v. Thomas*, 69 Fed. 588.

⁵ *United States v. Lophansky*, 232 Fed. 297.

to pry into the secrets of another, left in the hall of the residence of the addressee, is an offense under this section.⁶ But the section does not cover stealing a letter from the desk of the addressee left there by a letter carrier.⁷ After a letter has been delivered by the postal authorities to the person in whose care it is addressed it is no longer subject to the jurisdiction of the United States.⁸ To sustain a conviction for larceny of a letter from the mail evidence that it was taken from a *de facto* post office is sufficient.⁹ A conviction under this section may be had for larceny of a decoy or fake letter deposited in a place where letters are usually deposited addressed to a fictitious person.¹⁰ The intent to steal must exist at the same time that the mail matter is taken.¹¹ An offense is committed where one obtains a letter from the post office without authority from the addressee and subsequently converts the contents to his own use.¹² Receiving stolen checks knowing them to have been stolen from a "private" box designated by an order of the Postmaster-General as a "letter box" is an offense within this section.¹³

§ 856. Criminal Code. Sec. 195. Postmaster or Employee of Postal Service Detaining, Destroying, or Embezzling Letter, etc.

Whoever, being a postmaster or other person employed in any department of the postal service, shall unlawfully detain, delay, or open any letter, postal card, package, bag, or mail intrusted to him or which shall come into his possession, and which was intended to be conveyed by mail, or carried or delivered by any carrier, messenger, agent, or other person employed in any department of the postal service, or forwarded through or delivered from any post office or station thereof established by authority of the

⁶ *United States v. McCready*, 11 Fed. 225.

⁷ *United States v. Safford*, 66 Fed. 942.

⁸ *United States v. Huilsman*, 94 Fed. 486.

⁹ *Goode v. United States*, 159 U. S. 663, 40 L. ed. 297, 16 S. C. 136.

¹⁰ *Goode v. United States*, 159 U. S. 663, 40 L. ed. 297, 16 S. C. 136;

Montgomery v. United States, 162 U. S. 410, 40 L. ed. 1020, 16 S. C. 797.

¹¹ *United States v. Inabnet*, 41 Fed. 130.

¹² *In re Burkhardt*, 33 Fed. 25.

¹³ *Pakas v. United States*, 240 Fed. 350, 153 C. C. A. 276 (2d Cir.); *Affirmed* in 245 U. S. 467, 62 L. ed. 406, 38 S. C. 148. /

Postmaster-General; or shall secrete, embezzle, or destroy any such letter, postal card, package, bag, or mail; or shall steal, abstract, or remove from any such letter, package, bag, or mail, any article or thing contained therein, shall be fined not more than five hundred dollars, or imprisoned not more than five years, or both.¹

An indictment for detaining mail in the language of the statute is not demurrable. It is unnecessary to allege that the detention was knowingly and willful.² In prosecutions under this section it is unnecessary to allege or prove all the essentials of the crime of larceny.³ In an indictment for stealing a check it may be described substantially according to its tenor.⁴ An indictment under this section for embezzling a letter which fails to allege that the letter came into defendant's possession in the course of or by reason of his official character is demurrable.⁵ It is unnecessary to allege that a package stolen from the mails was stamped where the indictment alleges that the package was "put into the mail."⁶ Embezzling a letter and stealing its contents, though distinct offenses, are of the same grade and penalty and so may be charged as one offense in the same count of an indictment where they are parts of the same transaction.⁷ An indictment need not allege the ownership of a letter alleged to have been embezzled.⁸ In a prosecution under this section for detaining a letter there must be proof that the defendant acted with an unlawful intent.⁹ In a prosecution for embezzling a letter, where there was evidence that defendant opened the letter and abstracted its contents and

§ 856. ¹ R. S. Sec. 3890, 3891, 35 Stat. L. 1125.

² *McShann v. United States*, 231 Fed. 923, 146 C. C. A. 119 (8th Cir.). *United States v. Holmes*, 40 Fed. 750. See also *Fliashnick v. United States*, 223 Fed. 736, 139 C. C. A. 266 (2d Cir.). For a case where the evidence was held to sustain a conviction, consult *Welsing v. United States*, 218 Fed. 369, 134 C. C. A. 177 (2d Cir.).

³ *Thompson v. United States*, 202 Fed. 401, 120 C. C. A. 575 (9th Cir.).

⁴ *Jones v. United States*, 27 Fed. 447.

⁵ *Shaw v. United States*, 165 Fed. 174, 91 C. C. A. 208 (6th Cir.).

⁶ *Alexis v. United States*, 129 Fed. 60, 63 C. C. A. 502 (5th Cir.).

⁷ *United States v. Byrne*, 44 Fed. 188.

⁸ *United States v. Trosper*, 127 Fed. 476; *United States v. Falkenhainer*, 21 Fed. 624. *United States v. Baugh*, 1 Fed. 784.

⁹ *Fliashnick v. United States*, 223 Fed. 736, 139 C. C. A. 266 (2d Cir.).

defendant claimed he found the letter open and did not handle its contents, the defendant is entitled to show that many letters came in bad condition with edges torn.¹⁰ The jury can decide whether there is sufficient evidence of felonious intent through an examination of the accused's actions.¹¹ It is no defense to an indictment for embezzling a letter that the defendant took the contents of the letter, borrowing them, and that he intended to return them and did return them.¹² A defendant need not introduce expert testimony to prove that an envelope addressed to his wife, containing the matter alleged to be stolen, was not in his handwriting. Especially is this so when the defendant takes the stand and denies the genuineness of the writing. The Court may not, in its charge, comment on the defendant's failure to produce such expert testimony, and to do so is reversible error.¹³ In an indictment for stealing a check from a letter the value of the check need not be alleged or proved.¹⁴ The mail matter secreted or destroyed need not be of any value.¹⁵ The offense of "stealing" a letter under this section carries with it the common law incidents of simple larceny in so far that it is ambulatory in its nature and it is not necessary to prove that the letter was "taken" or "abstracted" from the mail in the district of trial if defendant brought the letter into said district.¹⁶ A postmaster who received a sum of money including silver coins to be forwarded by registered mail, wrote a letter to accompany the money, and issued a formal receipt to the sender, cannot be convicted of embezzling a letter where there is no evidence that the letter was ever stamped, sealed, or put in the envelope used for registered letters.¹⁷ A local mail agent who receives a letter to be delivered to a mail agent to be conveyed through the mails is "entrusted with mail matter."¹⁸ The language of this section covers merchandise

¹⁰ *Chitwood v. United States*, 153 Fed. 551, 82 C. C. A. 505 (8th Cir.).

¹¹ *Welsing v. United States*, 218 Fed. 369, 134 C. C. A. 177 (2d Cir.).

¹² *United States v. Thompson*, 29 Fed. 706.

¹³ *Perara v. United States*, 221 Fed. 213, 136 C. C. A. 623 (8th Cir.).

¹⁴ *Jones v. United States*, 27 Fed.

¹⁵ *United States v. Gruver*, 35 Fed. 59.

¹⁶ *Perara v. United States*, 221 Fed. 213, 136 C. C. A. 623 (8th Cir.).

¹⁷ *United States v. Taylor*, 37 Fed. 200.

¹⁸ *United States v. Hamilton*, 9 Fed. 442.

mailed.¹⁹ A "decoy" letter deposited in the mail to be delivered to a fictitious addressee is "intended to be conveyed by mail" within the language of this section.²⁰ But a decoy letter placed by a Government agent in basket containing only letters to be destroyed or sent to the dead letter office is not within this section.²¹

§ 857. Criminal Code. Sec. 196. Postmaster, etc., Detaining or Destroying Newspapers.

Whoever, being a postmaster or other person employed in any department of the postal service, shall improperly detain, embezzle, or destroy any newspaper, or permit any other person to detain, delay, embezzle, or destroy the same, or open, or permit any other person to open, any mail or package of newspapers not directed to the office where he is employed; or whoever shall open, embezzle, or destroy any mail or package of newspapers not being directed to him, and he not being authorized to open or receive the same; or whoever shall take or steal any mail or package of newspapers from any post-office or from any person having custody thereof, shall be fined not more than one hundred dollars, or imprisoned not more than one year, or both.¹

§ 858. Criminal Code. Sec. 197. Assaulting Mail Carrier with Intent to Rob, and Robbing Mail.

Whoever shall assault any person having lawful charge, control, or custody of any mail matter, with intent to rob, steal, or purloin such mail matter or any part thereof, or shall rob any such person of such mail or any part thereof, shall, for a first offense, be imprisoned not more than ten years; and if in effecting or attempting to effect such robbery, he shall wound the person having custody of the

¹⁹ *United States v. Blackman*, 17 Fed. 837.

²⁰ *Goode v. United States*, 159 U. S. 663, 40 L. ed. 297, 16 S. C. 136; *Montgomery v. United States*, 162 U. S. 410, 40 L. ed. 1020, 16 S. C. 797; *Hall v. United States*, 168 U. S. 632, 42 L. ed. 607, 18 S. C.

637; *Scott v. United States*, 172 U. S. 343, 43 L. ed. 471, 19 S. C. 209; *McShann v. United States*, 231 Fed. 923, 146 C. C. A. 119 (8th Cir.).

²¹ *United States v. Rapp*, 30 Fed. 818.

§ 857. ¹ Formerly R. S. Sec. 5471, 35 Stat. L. 1126.

mail, or put his life in jeopardy by the use of a dangerous weapon, or for a subsequent offense, shall be imprisoned twenty-five years.¹

It is proper to allege in the same count of an indictment under this section an attempt to commit robbery and in the course of such attempt that the defendant put the life of a mail clerk in jeopardy by the use of a dangerous weapon.² In order to make out an offense under this section it has been held that there must be an attempt to rob the mail, not the express car alone or the passengers.³ Although the person indicted under this section had not been present at the actual robbery, he can be held as a principal because of Section 322 of the Penal Code.⁴ A defendant who had been indicted for robbing a United States mail carrier and for putting his life in jeopardy was allowed ten peremptory challenges.⁵ It is sufficient if the acts of the offenders created in the mind of the carrier a reasonable apprehension that he was in danger if he refused to surrender the mail.⁶ The law as it is now does not recognize the distinctions which once existed between classes of offenders such as accessories before the fact and principals. Therefore an indictment which charges one with doing the overt act is sufficient.⁷ This rule is applicable to misdemeanors as well as to felonies.⁸

§ 859. Criminal Code. Sec. 198. Injuring Letter Boxes or Mail Matter; Assaulting Carrier, etc.

That whoever shall willfully or maliciously injure, tear down, or destroy any letter box or other receptacle intended or used for the receipt or delivery of mail on any mail route, or shall break open the same, or shall willfully or maliciously injure, deface, or destroy any mail deposited therein, or shall willfully take or steal such mail from or out of such letter

§ 858. ¹ Formerly R. S. Sec. 5472, 5473, 35 Stat. L. 1126.

² Price v. United States, 218 Fed. 149, 132 C. C. A. 1 (8th Cir.).

³ United States v. Reeves, 38 Fed. 404.

⁴ Vane v. United States, 254 Fed. 32, — C. C. A. — (9th Cir.).

⁵ Harrison v. United States, 163 U. S. 140, 41 L. ed. 104, 16 S. C. 961.

⁶ United States v. Reeves, 38 Fed. 404.

⁷ Vane v. United States, 254 Fed. 32, — C. C. A. — (9th Cir.).

⁸ Vane v. United States, 254 Fed. 32, — C. C. A. — (9th Cir.).

box or other receptacle, or shall willfully aid or assist in any of the aforementioned offenses, shall for every such offense be punished by a fine of not more than \$1000, or by imprisonment for not more than three years.¹

§ 860. Criminal Code. Sec. 199. Deserting the Mail.

Whoever, having taken charge of any mail, shall voluntarily quit or desert the same before he has delivered it into the post office at the termination of the route, or to some known mail carrier, messenger, agent, or other employee in the postal service authorized to receive the same, shall be fined not more than five hundred dollars, or imprisoned not more than one year, or both.¹

§ 861. Criminal Code. Sec. 200. Delivery of Letters by Master of Vessel.

The master or other person having charge or control of any steamboat or other vessel passing between ports or places in the United States, arriving at any such port or place where there is a post office, shall deliver to the postmaster or at the post office within three hours after his arrival, if in the daytime, and if at night, within two hours after the next sunrise, all letters and packages brought by him or within his power or control and not relating to the cargo, addressed to or destined for such port or place, for which he shall receive from the postmaster two cents for each letter or package so delivered, unless the same is carried under a contract for carrying the mail; and for every failure so to deliver such letters or packages, the master or other person having charge or control of such steamboat or other vessel shall be fined not more than one hundred and fifty dollars.¹

§ 862. Criminal Code. Sec. 201. Obstructing the Mail.

Whoever shall knowingly and willfully obstruct or retard the passage of the mail, or any carriage, horse, driver, or carrier, or car, steamboat, or other conveyance or vessel

§ 859. ¹ Formerly R. S. Sec. 3869,
5466, 39 Stat. L. 162, as amended
by 39 Stat. L. 418.

§ 860. ¹ Formerly R. S. Sec. 5474,
35 Stat. L. 1126.

§ 861. ¹ R. S. Sec. 3977, 35 Stat.
L. 1126.

carrying the same, shall be fined not more than one hundred dollars, or imprisoned not more than six months, or both.¹

This section is constitutional.² An indictment for conspiracy to violate this section must allege that the defendant knew that the train whose passage was obstructed was carrying mail.³ But every one is charged with knowledge that passenger railways in the United States ordinarily carry mail.⁴ The indictment must allege that the illegal act was done "knowingly and willfully", but it is not bad if it fails to allege that it was done "feloniously."⁵ "Knowingly and willfully" as used in this section, mean either that the defendant knows what effect his act will have and then proceeds to do the act, or that the defendant obstructs the mail while doing an unlawful act.⁶ Arresting a mail carrier upon criminal process, while engaged in carrying the mails, is not a violation of this section.⁷ Unlawfully detaining a railway car containing mail matter is sufficient evidence of the intent necessary to support a conviction under this section.⁸ It is no defense to an indictment under this section that the defendant, a toll gate keeper, who refused to permit a wagon carrying mail to pass over a toll road without paying toll in advance, was authorized by a State statute to stop persons refusing to pay toll in advance.⁹ Refusing to permit a mail train to proceed unless a car, not carrying mail, be detached is an offense under this section.¹⁰ Preventing the passage of a mail train over a right of way for which the accused had a writ of possession is an offense under this section.¹¹

§ 862. ¹ Formerly R. S. Sec. 3995, 35 Stat. L. 1127.

² *United States v. Sears*, 55 Fed. 268.

³ *Salla v. United States*, 104 Fed. 544, 44 C. C. A. 26 (9th Cir.); *Conrad v. United States*, 127 Fed. 798, 62 C. C. A. 478 (5th Cir.).

⁴ *United States v. Hall*, 206 Fed. 484.

⁵ *United States v. Debs*, 65 Fed. 210.

⁶ *United States v. Kirby*, 7 Wall. 482, 19 L. ed. 278; *United States v.*

Claypool, 14 Fed. 127; *United States v. Stickrath*, 242 Fed. 151, 154.

⁷ *United States v. Kirby*, 7 Wall. (U. S.) 482, 19 L. ed. 278.

⁸ *United States v. Kane*, 19 Fed. 42.

⁹ *United States v. Sears*, 55 Fed. 268. *Contra*: *Harper v. Endert*, 103 Fed. 911.

¹⁰ *United States v. Cassidy*, 67 Fed. 698.

¹¹ *United States v. DeMott*, 3 Fed. 478.

Murder committed while committing a violation of this section is cognizable by a State Court.¹²

§ 863. Criminal Code. Sec. 202. Ferryman Delaying the Mail.

Whoever, being a ferryman, shall delay the passage of the mail by willful neglect or refusal to transport the same across any ferry, shall be fined not more than one hundred dollars.¹

§ 864. Criminal Code. Sec. 203. Letters Carried in a Foreign Vessel to Be Deposited in a Post Office.

All letters or other mailable matter conveyed to or from any part of the United States by any foreign vessel, except such sealed letters relating to such vessel or any part of the cargo thereof as may be directed to the owners or consignees of the vessel, shall be subject to postage charge, whether addressed to any person in the United States or elsewhere, provided they are conveyed by the packet or other ship of a foreign country imposing postage on letters or other mailable matter conveyed to or from such country by any vessel of the United States; and such letters or other mailable matter carried in foreign vessels, except such sealed letters relating to the vessel or any part of the cargo thereof as may be directed to the owners or consignees, shall be delivered into the United States post office by the master or other person having charge or control of such vessel when arriving, and be taken from the United States post office when departing, and the postage justly chargeable by law paid thereon; and for refusing or failing to do so, or for conveying such letters or other mailable matter, intended to be conveyed in any vessel of such foreign country, over or across the United States, or any portion thereof, the party offending shall be fined not more than one thousand dollars.¹

§ 865. Criminal Code. Sec. 204. Vessels to Deliver Letters at Post Office; Oath.

No vessel arriving within a port or collection district of the United States shall be allowed to make entry or break

¹² *Crossley v. California*, 168 U. S. 640, 42 L. ed. 610, 18 S. C. 242.

§ 864. ¹ Formerly R. S. Sec. 4016, 35 Stat. L. 1127.

§ 863. ¹ Formerly R. S. Sec. 3996, 35 Stat. L. 1127.

bulk until all letters on board are delivered to the nearest post office, and the master or other person having charge or control thereof has signed and sworn to the following declaration before the collector or other proper customs officer :

I, A. B., master —, of the —, arriving from —, and now lying in the port of —, do solemnly swear (or affirm) that I have to the best of my knowledge and belief delivered to the post office at — every letter and every bag, packet, or parcel of letters which was on board the said vessel during her last voyage, or which were in my possession or under my power or control.

And any master or other person having charge or control of such vessel who shall break bulk before he has delivered such letters shall be fined not more than one hundred dollars.¹

§ 866. Criminal Code. Sec. 205. Using, Selling, etc., Canceled Stamps ; Removing Cancellation Marks from Stamps, etc.

Whoever shall use or attempt to use in payment of postage, any canceled postage stamp, whether the same has been used or not ; or shall remove, attempt to remove, or assist in removing, the canceling or defacing marks from any postage stamp, or the superscription from any stamped envelope, or postal card, that has once been used in payment of postage, with the intent to use the same for a like purpose, or to sell or offer to sell the same, or shall knowingly have in possession any such postage stamp, stamped envelope, or postal card, with intent to use the same or shall knowingly sell or offer to sell any such postage stamp, stamped envelope, or postal card, or use or fully shall remove from any mail matter any stamp attached thereto in payment of postage ; or shall knowingly use or cause to be used in payment of postage, any postage stamp, postal card, or stamped envelope, issued in pursuance of law, which has already been used for a like purpose ; shall, if he be a person employed in the postal service, be fined not more than five hundred dollars, or imprisoned not more than three years, or both ; and if he be a person not employed in the postal service, shall be fined not more than five hundred dollars, or imprisoned not more than one year, or both.¹

§ 865. ¹ Formerly R. S. Sec. 3988,
35 Stat. L. 1127.

§ 866. ¹ Formerly R. S. Sec. 3922
to 3925, 35 Stat. L. 1127.

§ 867. Criminal Code. Sec. 206. False Returns to Increase Compensation.

Whoever, being a postmaster or other person employed in any branch of the postal service, shall make, or assist in making, or cause to be made, a false return, statement, or account to any officer of the United States, or shall make, assist in making, or cause to be made, a false entry in any record, book, or account, required by law or the rules or regulations of the Post Office Department to be kept in respect of the business or operations of any post office or other branch of the postal service, for the purpose of fraudulently increasing his compensation or the compensation of the postmaster or any employee in a post office; or whoever, being a postmaster or other person employed in any post office or station thereof, shall induce, or attempt to induce, for the purpose of increasing the emoluments or compensation of his office, any person to deposit mail matter in, or forward in any manner for mailing at, the office where such postmaster or other person is employed knowing such matter to be properly mailable at another post office, shall be fined not more than five hundred dollars, or imprisoned not more than two years, or both.¹

Testimony by a postal inspector as to the proportion of cancellation of stamps and sale thereof is competent and will be received in the trial of a postmaster for having made a false account under this section.² It is an offense under this section for a postmaster to include in a return as a part of his gross receipts, receipts from the sale in large quantities of stamps to be used on mail to be deposited at another post office.³

§ 868. Criminal Code. Sec. 207. Collection of Unlawful Postage Forbidden.

Whoever, being a postmaster or other person authorized to receive the postage of mail matter, shall fraudulently demand or receive any rate of postage or gratuity or reward other than is provided by law for the postage of such

¹ § 867. ¹ 35 Stat. L. 1128.

³ United States v. Foster, 233

² Kenney v. United States, 254 U. S. 515, 58 L. ed. 1074, 34 S. C. Fed. 262, 165 C. C. A. 550 (5th Cir.). 666, reversing 211 Fed. 206.

mail matter, shall be fined not more than one hundred dollars, or imprisoned not more than six months, or both.¹

§ 869. Criminal Code. Sec. 208. Unlawful Pledging or Sale of Stamps.

Whoever, being a postmaster or other person employed in any branch of the postal service, and being intrusted with the sale or custody of postage stamps, stamped envelopes, or postal cards, shall use or dispose of them in the payment of debts, or in the purchase of merchandise or other salable articles, or pledge or hypothecate the same, or sell or dispose of them except for cash; or sell or dispose of postage stamps or postal cards for any larger or less sum than the values indicated on their faces; or sell or dispose of stamped envelopes for a larger or less sum than is charged therefor by the Post Office Department for like quantities; or sell or dispose of, or cause to be sold or disposed of, postage stamps, stamped envelopes, or postal cards at any point or place outside of the delivery of the office where such postmaster or other person is employed; or induce or attempt to induce, for the purpose of increasing the emoluments or compensation of such postmaster, or the emoluments or compensation of any other person employed in such post office or any station thereof, or the allowances or facilities provided therefor, any person to purchase at such post office or any station thereof, or from any employee of such post office, postage stamps, stamped envelopes, or postal cards; or sell or dispose of postage stamps, stamped envelopes, or postal cards, otherwise than as provided by law or the regulations of the Post Office Department, shall be fined not more than five hundred dollars, or imprisoned not more than one year, or both.¹

It is an offense under this section to make unlawfully induced sales, or sales made "outside of the delivery of the office", or sales made "otherwise than as provided by law or the regulations of the Post Office Department."² A postmaster who uses stamps

§ 868. ¹ Formerly R. S. Sec. 3899,
35 Stat. L. 1128.

² United States v. Foster, 233
U. S. 515, 58 L. ed. 1074, 34 S. C.

§ 869. ¹ Formerly R. S. Sec. 3920,
35 Stat. L. 1128.

666.

in payment for merchandise, buying the stamps from himself, is guilty of an offense under this section.³ But to be within this section the stamps must have been received by the postmaster in his official capacity.⁴

§ 870. Criminal Code. Sec. 209. Failure to Account for Postage and to Cancel Stamps, etc., by Officials.

Whoever, being a postmaster or other person engaged in the postal service, shall collect and fail to account for the postage due upon any article of mail matter which he may deliver, without having previously affixed and canceled the special stamp provided by law, or shall fail to affix such stamp, shall be fined not more than fifty dollars.¹

§ 871. Criminal Code. Sec. 210. Issuing Money Order without Payment.

Whoever, being a postmaster or other person employed in any branch of the postal service, shall issue a money order without having previously received the money therefor, shall be fined not more than five hundred dollars.¹

A conviction under this section does not bar a subsequent prosecution under Section 218 for issuing the same order with intent to defraud, but it does bar a subsequent prosecution under this section for issuing other money orders at the same time and as parts of the same transaction involved in the previous conviction.² A person who receives a money order from one having no authority to issue same can be held for its value by the United States even though he has paid for it in good faith to the alleged agent.³ Issuance of a money order by a post office clerk in payment of his private debts constitutes embezzlement.⁴

³ United States v. Douglass, 33 Fed. 381.

⁴ United States v. Williamson, 26 Fed. 690.

§ 870. ¹ 35 Stat. L. 1128.

§ 871. ¹ Formerly R. S. Sec. 4030, 35 Stat. L. 1129. For a case of a newspaper editor charged with circulating his paper in violation of this

section and the charge of the Court, see Dunlap v. United States, 165 U. S. 486, 41 L. ed. 799, 17 S. C. 375.

² United States v. Komie, 194 Fed. 567.

³ United States v. Bolognesi, 164 Fed. 159.

⁴ United States v. Royer, 122 Fed. 844.

§ 872. Criminal Code. Sec. 211. Obscene, etc., Matter Non-mailable.

Every obscene, lewd, or lascivious, and every filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character, and every article or thing designed, adapted, or intended for preventing conception or producing abortion, or for any indecent or immoral use; and every article, instrument, substance, drug, medicine, or thing which is advertised or described in a manner calculated to lead another to use or apply it for preventing conception or producing abortion, or for any indecent or immoral purpose; and every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information directly or indirectly, where, or how, or from whom, or by what means any of the hereinbefore-mentioned matters, articles, or things may be obtained or made, or where or by whom any act or operation of any kind for the procuring or producing of abortion will be done or performed, or how or by what means conception may be prevented or abortion produced, whether sealed or unsealed; and every letter, packet, or package, or other mail matter containing any filthy, vile, or indecent thing, device, or substance; and every paper, writing, advertisement, or representation that any article, instrument, substance, drug, medicine, or thing may, or can be, used or applied for preventing conception or producing abortion, or for any indecent or immoral purpose; and every description calculated to induce or incite a person to so use or apply any such article, instrument, substance, drug, medicine, or thing, is hereby declared to be non-mailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier. Whoever shall knowingly deposit, or cause to be deposited for mailing or delivery, anything declared by this section to be non-mailable, or shall knowingly take, or cause the same to be taken, from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than five thousand dollars, or imprisoned not more than five years, or both.¹

§ 872. ¹ Formerly R. S. Sec. 3893, under §§ 873 and 906.

35 Stat. L. 1129. See also notes

The constitutionality of this section has been upheld.² The indictment need not contain the entire writing alleged to be objectionable; it is sufficient to allege its character, and describe it, and leave further disclosures to the introduction of evidence or to the bill of particulars.³ An indictment which fails to set forth the letter and contains no averment that it is too indecent to set it forth, and which also fails to identify the letter by date or by the date of mailing is fatally defective.⁴ Describing matter as "indecent" which had been previously described as "obscene, lewd, and lascivious", does not invalidate the indictment.⁵ An indictment which merely states that the defendant caused to be deposited in the post office "a certain letter and writing giving information . . . where, how, and of whom, and by what means, an article or thing designed and intended for the prevention of conception might be obtained", is insufficient.⁶ An indictment which neither gives the date nor the general terms of a letter alleged to be obscene, etc., and further states that there was enclosed in the said letter, an article calculated to be used for an indecent purpose, but failed to indicate the nature or kind of the article enclosed, is so vague and indefinite that it is demurrable.⁷ An indictment which charges that the defendant by his letter intended to give information only as to where or by whom an abortion *might* be produced, not as to where or by whom it *would* be produced, is fatally defective.⁸ Alleging the address of the person to whom the letter was addressed does not go to the substance of the crime but is rather for the purpose of identification.⁹ An indict-

² *Coomer v. United States*, 213 Fed. 1, 129 C. C. A. 617 (8th Cir.); *Tyomies Publishing Co. v. United States*, 211 Fed. 385, 128 C. C. A. 47 (6th Cir.).

³ *Grimm v. United States*, 156 U. S. 604, 39 L. ed. 550, 15 S. C. 470; *DeGignac v. United States*, 113 Fed. 197, 52 C. C. A. 71 (7th Cir.); *United States v. Breinholm*, 208 Fed. 492; *Bartell v. United States*, 227 U. S. 427, 57 L. ed. 583, 33 S. C. 383; *Rosen v. United States*, 161 U. S. 29, 40 L. ed. 606, 16 S. C. 434, 480; *Rinker v. United States*, 151 Fed.

755, 81 C. C. A. 379 (8th Cir.); *Tubbs v. United States*, 105 Fed. 59, 44 C. C. A. 357 (8th Cir.).

⁴ *Floren v. United States*, 186 Fed. 961, 108 C. C. A. 577 (8th Cir.).

⁵ *Lockhart v. United States*, 250 Fed. 610, 162 C. C. A. 626 (8th Cir.).

⁶ *United States v. Pupke*, 133 Fed. 243.

⁷ *Winters v. United States*, 201 Fed. 845, 120 C. C. A. 175 (8th Cir.).

⁸ *Bours v. United States*, 229 Fed. 960, 144 C. C. A. 242 (7th Cir.).

⁹ *United States v. Harris*, 122 Fed. 551.

ment under this section, averring that the newspapers deposited were to be transmitted by the post office to divers persons, is valid and sufficient although there is nothing describing the persons to whom they were addressed.¹⁰ The exact time of the commission of the crime under this section is a matter of form and not of substance.¹¹ If the indictment sets forth the crime with reasonable certainty, the circular alleged to have been sent need not be set forth.¹² The fact that the letter was written in answer to a decoy letter signed with a fictitious name cannot be taken advantage of by demurrer.¹³ It is proper to combine in one indictment a count under this section and another under Section 212 of the Criminal Code.¹⁴ On a motion to quash an indictment, the Court may, as a matter of law, examine the writing to see if it is within the prohibition of the act.¹⁵ It is too late to file a plea of misnomer after a motion to quash has been denied.¹⁶ When there is such doubt as to the meaning and effect of the contents of paper that persons would reasonably differ in respect thereto, the question should be submitted to the jury.¹⁷ There should be some affirmative evidence that the letter or package was at one time in the mails. Mere speculation and assumption is insufficient.¹⁸ Testimony by a Government agent regarding decoy letters sent to the defendant and the latter's replies thereto are admissible. It is no defense that if the decoy letters had not been sent the

¹⁰ *Magon v. United States*, 248 Fed. 201, 160 C. C. A. 279 (9th Cir.).

¹¹ *Rinker v. United States*, 151 Fed. 755, 81 C. C. A. 379 (8th Cir.).

¹² *Pilson v. United States*, 249 Fed. 328, 161 C. C. A. 336 (2d Cir.).

¹³ *United States v. Somers*, 164 Fed. 259, citing *Grimm v. United States*, 156 U. S. 604, 39 L. ed. 550, 15 S. C. 470.

¹⁴ *United States v. Davidson*, 244 Fed. 523; *Botsford v. United States*, 215 Fed. 510, 132 C. C. A. 22 (6th Cir.); *Magon v. United States*, 248 Fed. 201, 160 C. C. A. 279 (9th Cir.).

¹⁵ *United States v. O'Donnell*, 165 Fed. 218.

¹⁶ *Lee v. United States*, 156 Fed. 948, 84 C. C. A. 448 (9th Cir.).

¹⁷ *United States v. Journal Co. Inc.*, 197 Fed. 415, 416, cited in *Botsford v. United States*, 215 Fed. 510, 132 C. C. A. 22 (6th Cir.); *Tyomies Publishing Co. v. United States*, 211 Fed. 385, 128 C. C. A. 47 (6th Cir.); *Konda v. United States*, 166 Fed. 91, 92 C. C. A. 75 (7th Cir.), 22 L. R. A. (N. S.) 304; *Knowles v. United States*, 170 Fed. 409, 410, 95 C. C. A. 579 (8th Cir.); *Rosen v. United States*, 161 U. S. 29, 40 L. ed. 606, 16 S. C. 434, 480; *United States v. Kennerley*, 209 Fed. 119 and cases cited; *United States v. Dempsey*, 188 Fed. 450.

¹⁸ *Harvey v. United States*, 126 Fed. 357, 61 C. C. A. 61 (2d Cir.).

defendant would not have committed the crime.¹⁹ Introducing in evidence letters otherwise inadmissible for the purpose of comparing the writing thereon with other letters is reversible error.²⁰ The letter written by the defendant may be read in conjunction with the letter written by the complaining witness in order to make out the crime.²¹ Evidence showing a defendant's improper relations with another woman, although her name is mentioned in the obscene letters, is not admissible.²² Where a letter on its face is not obscene, lewd, or lascivious but such an import may be ascribed to it by surrounding circumstances and this is properly placed before the jury, a conviction will be sustained.²³ The whole letter should be considered in determining its character.²⁴ It is not admissible to prove the character of the complaining witness on the trial of an indictment under this section.²⁵ On the trial of an indictment under this section for giving information where an abortion would be committed the district attorney asked a witness the following question: ". . . Did he come to you and make a proposition to you to assist him in performing abortions and dividing the fees?" The Court excluded the question. The defendant requested an instruction that the jury disregard this question. This the trial court refused. On appeal, held to be reversible error.²⁶ It is admissible to introduce in evidence the caption and reading matter which not only identify but also characterize the picture alleged to be obscene, etc.²⁷ It is sufficient evidence to bring out knowledge on the part of the defendant that the objectionable matter was or would be

¹⁹ *Andrews v. United States*, 162 U. S. 420, 40 L. ed. 1023, 16 S. C. 798; *Rosen v. United States*, 161 U. S. 29, 40 L. ed. 606, 16 S. C. 434, 480.

²⁰ *Barnes v. United States*, 166 Fed. 113, 92 C. C. A. 97 (5th Cir.).

²¹ *Clark v. United States*, 202 Fed. 740, 121 C. C. A. 209 (8th Cir.).

²² *Toothman v. United States*, 203 Fed. 218, 121 C. C. A. 424 (4th Cir.).

²³ *Parish v. United States*, 247 Fed. 40, 159 C. C. A. 258 (4th Cir.); *Grimm v. United States*, 156 U. S.

604, 39 L. ed. 550, 15, S. C. 470; *Shepard v. United States*, 160 Fed. 584, 87 C. C. A. 486 (8th Cir.).

²⁴ *United States v. Hanover*, 17 Fed. 444.

²⁵ *Robbins v. United States*, 229 Fed. 987, 144 C. C. A. 269 (9th Cir.), citing *United States v. Musgrave*, 160 Fed. 700.

²⁶ *Bombarger v. United States*, 219 Fed. 841, 135 C. C. A. 511 (5th Cir.).

²⁷ *Tyomies Publishing Co. v. United States*, 211 Fed. 385, 128 C. C. A. 47 (6th Cir.).

mailed.²⁸ The person depositing the lewd, lascivious, and obscene matter must have knowledge that the matter is of that kind.²⁹ Even though the motive to corrupt youth might have been lacking, if, in fact, the writing is obscene, the depositing same in a post office is made a crime by statute.³⁰ Conversations had by the complaining witness with the defendant may be admissible to show intent in mailing what might be construed a harmless letter.³¹ Sending circulars giving information where and for how much an abortion will be committed, is a crime.³² If a physician in answer to a letter states that he might operate if an examination warranted it, he commits no crime.³³ The article may be of legitimate use. It in fact may not prevent conception. But if it is calculated to lead another to use it for such purpose, it is unlawful.³⁴ However innocent a letter or writing may be on its face, if it conveyed, and was intended to convey, information in respect to the place or person where, or of whom, the objectionable matters could be obtained, it is within the statute.³⁵ The aim of this section is to prevent the use of the United States mails for the purpose of inciting or causing sexual impurity.³⁶ A newspaper article which repeatedly refers to and plainly describes and charges illegitimate sexual acts and intercourse is within the prohibition of the law.³⁷ In cases of "ac-

²⁸ *Demolli v. United States*, 144 Fed. 363, 75 C. C. A. 365 (8th Cir.); *Burton v. United States*, 142 Fed. 57, 73 C. C. A. 243 (8th Cir.).

²⁹ *Rosen v. United States*, 161 U. S. 29, 40 L. ed. 606, 16 S. C. 434, 480; *Price v. United States*, 165 U. S. 311, 41 L. ed. 727, 17 S. C. 366.

³⁰ *Knowles v. United States*, 170 Fed. 409, 95 C. C. A. 579 (8th Cir.).

³¹ *United States v. Kline*, 201 Fed. 954.

³² *Wetzel v. United States*, 233 Fed. 984, 147 C. C. A. 658 (9th Cir.); *Shepard v. United States*, 160 Fed. 584, 87 C. C. A. 486 (8th Cir.).

³³ *Bours v. United States*, 229 Fed. 960, 144 C. C. A. 242 (7th Cir.).

³⁴ *Ackley v. United States*, 200 Fed. 217, 222, 118 C. C. A. 403 (8th Cir.).

³⁵ *Grimm v. United States*, 156

U. S. 604, 39 L. ed. 550, 15 S. C. 470; *United States v. Breinholm*, 208 Fed. 492; *Lee v. United States*, 156 Fed. 948, 84 C. C. A. 448 (9th Cir.); *United States v. Somers*, 164 Fed. 259; *Shepard v. United States*, 160 Fed. 584, 87 C. C. A. 486 (8th Cir.); *United States v. Moore*, 129 Fed. 159.

³⁶ *Swearingen v. United States*, 161 U. S. 446, 40 L. ed. 765, 16 S. C. 562; *United States v. Davidson*, 244 Fed. 523; *United States v. Wyatt*, 122 Fed. 316; *United States v. Benedict*, 165 Fed. 221; *United States v. O'Donnell*, 165 Fed. 218; *Tyomies Publishing Co. v. United States*, 211 Fed. 385, 128 C. C. A. 47 (6th Cir.).

³⁷ *United States v. Klauder*, 240 Fed. 501; *Dunlop v. United States*, 165 U. S. 486, 41 L. ed. 799, 17 S. C. 375.

curate contemporaneous reports of testimony taken in open court, during the progress of judicial trials, published in reputable journals . . . only clear and palpable infractions of the statute should be noticed. . . .”³⁸ Where the acts described and the ideas conveyed in a book were calculated to deprave the morals of the reader by exciting sensual desires and libidinous thoughts, the book was held to be obscene.³⁹ Before a publication is held to be obscene, lascivious, lewd, or indecent, it must be calculated to deprave the ordinary reader, his morals, or lead to impure purposes.⁴⁰ “I think the language ‘filthy . . . letter . . . of an indecent character’ brings within the statute a communication sent to another through the mails which would not be covered by the preceding words obscene, lewd, and lascivious if it be a filthy letter of an indecent character, even though it is not of a character which would promote or excite sexual desires and emotions.”⁴¹ It was the apparent purpose of Congress in enacting this section that the use of the mails should be prohibited, not only to such letters, books, and pictures which are lewd and lascivious but also to every filthy communication, book, or picture.⁴² A letter written to a woman accusing her of being a prostitute and the mother of a bastard child, while not lewd and lascivious, is, nevertheless, indecent, and is within the terms of this section.⁴³ The statute applies to a letter that passed between husband and wife.⁴⁴ The inquiry must be narrowed as to its tendency to corrupt the addressee.⁴⁵ The test is the tendency to deprave and corrupt the minds of those who are open to such influence, into whose hands the publication may come.⁴⁶ This section applies to a postal card imputing

³⁸ Per Waddill, D. J. in *United States v. Journal Co. Inc.*, 197 Fed. 415, 418, 419.

³⁹ *Burton v. United States*, 142 Fed. 57, 73 C. C. A. 243 (8th Cir.).

⁴⁰ *Dunlop v. United States*, 165 U.S. 486, 41 L. ed. 799, 17 S. C. 375; *United States v. Benedict*, 165 Fed. 221; *United States v. Musgrave*, 160 Fed. 700; *Botsford v. United States*, 215 Fed. 510, 132 C. C. A. 22 (6th Cir.).

⁴¹ Per Ray, D. J. in *United States v. Davidson*, 244 Fed. 523, 535.

⁴² *United States v. Dempsey*, 188 Fed. 450.

⁴³ *United States v. Davidson*, 244 Fed. 523.

⁴⁴ *United States v. Musgrave*, 160 Fed. 700.

⁴⁵ *United States v. Wroblenski*, 118 Fed. 495; *Parish v. United States*, 247 Fed. 40, 159 C. C. A. 258 (4th Cir.). See also *United States v. Davidson*, 244 Fed. 523.

⁴⁶ *Rosen v. United States*, 161 U. S. 29, 40 L. ed. 606, 16 S. C. 434,

illicit sexual intercourse to a person other than the addressee.⁴⁷ A corporation may be guilty of a violation of this section.⁴⁸ Writings which are merely abusive, scandalous, scurrilous, improper, etc., or even libelous, are not within the prohibition of this statute.⁴⁹ The sending through the mails of pamphlets discussing venereal diseases which were sent only to those who were represented or understood to require treatment for one or more of the causes of the said diseases and which were not otherwise circulated, was held not to violate this section.⁵⁰ The mailing of an article upon a religious subject is not within the statute even though it contains views which are disgusting or radically different from those held by a majority of the people. The coarseness of the language used, even though it be obscene, is not sufficient to make the mailing of such written matter a crime.⁵¹ It is not a crime to mail a writing inclosed in a sealed envelope and addressed to one's self. The law contemplates a publication.⁵² It is not enough that a letter or publication be offensive to the feelings or the pride of those into whose hands it may come. Considerations of caste or social position do not enter into the law. The evil character of the letter or publication declared non-mailable by the clause of the statute under consideration must be reasonably apparent or discernible on its face. It need not be in particular words, but may appear in the structure of the sentences, and either directly or indirectly by innuendo or suggestion, or in the thought conveyed. *Dunlop v. United States*⁵³ involved newspaper publications of the latter character.

480; *MacFadden v. United States*, 165 Fed. 51, 91 C. C. A. 89 (3d Cir.); *Shepard v. United States*, 160 Fed. 584, 87 C. C. A. 486 (8th Cir.).

⁴⁷ *United States v. Pratt*, Fed. Cas. No. 16082; *Griffin v. United States*, 248 Fed. 6, 160 C. C. A. 146 (1st Cir.).

⁴⁸ *United States v. New York Herald Co.*, 159 Fed. 296.

⁴⁹ *United States v. Klauder*, 240 Fed. 501, *citing* *Swearingen v. United States*, 161 U. S. 446, 40 L. ed. 765, 16 S. C. 562; *United States v. O'Donnell*, 165 Fed. 218; *People v.*

Eastman, 188 N. Y. 478, 81 N. E. 459, 11 Ann. Cas. 302; *United States v. Wroblenski*, 118 Fed. 495.

⁵⁰ *Hanson v. United States*, 157 Fed. 749, 85 C. C. A. 325 (7th Cir.).

⁵¹ *United States v. Moore*, 104 Fed. 78.

⁵² *United States v. Reinheimer*, 233 Fed. 545; *Andrews v. United States*, 162 U. S. 420, 40 L. ed. 1023, 16 S. C. 798, reviewing the authorities.

⁵³ 165 U. S. 486, 41 L. ed. 799, 17 S. C. 375; *Sales v. United States*, 258 Fed. 597, 598, — C. C. A. — (8th Cir.).

Instances of suggestive letters held to offend the statute may be found in *Parish v. United States*⁵⁴ and *United States v. Moore*.⁵⁵ Under this clause of the statute if the letter or publication is not objectionable, an undisclosed motive or intent of the writer cannot be made the basis of a prosecution.⁵⁶ In *Knowles v. United States*,⁵⁷ it was held that a good motive was no defense to an evil publication. The converse is measurably true. If an undisclosed evil motive or intent could bring within the statute a letter or publication that is innocent and mailable upon its face, convictions could be sustained in cases of simple newspaper "want ads," upon proof of an evil "ultimate purpose, motive, or intent" in the mind of an advertiser or publisher who employed the mails. Doubtless that would be a proper field for legislation, and the court held that the statute does not go so far.⁵⁸

§ 873. Criminal Code. Sec. 212. Libelous and Indecent Wrappers and Envelopes.

All matter otherwise mailable by law, upon the envelope or outside cover or wrapper of which, or any postal card upon which, any delineations, epithets, terms, or language of an indecent, lewd, lascivious, obscene, libelous, scurrilous, defamatory, or threatening character, or calculated by the terms or manner or style of display and obviously intended to reflect injuriously upon the character or conduct of another, may be written or printed or otherwise impressed or apparent, are hereby declared non-mailable matter, and shall not be conveyed in the mails nor delivered from any post office nor by any letter carrier, and shall be withdrawn from the mails under such regulations as the Postmaster-General shall prescribe. Whoever shall knowingly deposit or cause to be deposited, for mailing or delivery, anything declared by this section to be non-mailable matter, or shall knowingly take the same or cause the same to be taken from the mails for the purpose of circulating or disposing of the same, shall be fined not more than five thou-

⁵⁴ 247 Fed. 40, 159 C. C. A. 258 (4th Cir.).

⁵⁵ 129 Fed. 159.

⁵⁶ *Sales v. United States*, 258 Fed. 597, 598, — C. C. A. — (8th Cir.).

⁵⁷ 170 Fed. 409, 95 C. C. A. 579 (8th Cir.).

⁵⁸ *Sales v. United States*, 258 Fed. 597, 598, — C. C. A. (8th Cir.).

sand dollars, or imprisoned not more than five years, or both.¹

This section applies to the outside cover of a paper on which is written the name and address of the addressee, or envelope or wrapper.² The delineations, epithets, terms or language on the envelope must, of itself or of themselves, be of an indecent, lewd, lascivious, obscene, libelous, scurrilous, defamatory, or threatening character, and *obviously* intended to reflect injuriously upon the character or conduct of another.³ An indictment containing two counts under Sections 211 and 212 is valid.⁴ Addressing an envelope "Room 32, Pease House, Front St. City, The Notorious" is not a crime within the meaning of this section.⁵

§ 874. Criminal Code. Sec. 213. Lottery, Gift Enterprise, etc., Circulars, etc., Not Mailable.

No letter, package, postal card, or circular concerning any lottery, gift enterprise, or similar scheme offering prizes dependent in whole or in part upon lot or chance; and no lottery ticket or part thereof, or paper, certificate, or instrument purporting to be or to represent a ticket, chance, share, or interest in or dependent upon the event of a lottery, gift enterprise, or similar scheme offering prizes dependent in whole or in part upon lot or chance; and no check, draft, bill, money, postal note, or money order, for the purchase of any ticket or part thereof, or of any share or chance in any such lottery, gift enterprise, or scheme; and no newspaper, circular, pamphlet, or publication of any kind containing any advertisement of any lottery, gift enterprise, or scheme of any kind offering prizes dependent in whole or in part upon lot or chance, or containing any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme of any kind offering prizes dependent in whole or in part upon lot or chance, or containing any list of the prizes drawn or awarded

§ 873. ¹ 35 Stat. L. 1129.

² Botsford v. United States, 215 Fed. 510, 132 C. C. A. 22 (6th Cir.).
See, however, United States v. Higgins, 194 Fed. 539.

³ United States v. Davidson, 244 Fed. 523, 526.

⁴ Griffin v. United States, 248 Fed. 6, 160 C. C. A. 146 (1st Cir.).

⁵ United States v. Jarvis, 59 Fed. 357.

by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes, shall be deposited in or carried by the mails of the United States, or be delivered by any postmaster or letter carrier. Whoever shall knowingly deposit or cause to be deposited, or shall knowingly send or cause to be sent, anything to be conveyed or delivered by mail in violation of the provisions of this section, or shall knowingly deliver or cause to be delivered by mail anything herein forbidden to be carried by mail, shall be fined not more than one thousand dollars, or imprisoned not more than two years, or both; and for any subsequent offense shall be imprisoned not more than five years. Any person violating any provision of this section may be tried and punished either in the district in which the unlawful matter or publication was mailed, or to which it was caused to be delivered by mail to the person to whom it was addressed.¹

This section is constitutional under Article 1, Par. 8 and Article 2, Par. 8.² An indictment alleging that defendant improved a few lots so as to make them valuable, while the unimproved lots were worth about \$10, and offered all for sale at \$130 on the false representation that they were all improved and that defendant made the offer by use of the mails was sustained.³ Section 216 makes it a criminal offense to use the mails in carrying on any unlawful business under a fictitious name. This section makes it an offense to promote the lottery business. Construed in *pari materia* it plainly shows the intent of Congress to make the use of mails to promote the lottery business under an assumed name a criminal offense.⁴ It seems that when no value is asked of the participant, the offeror of the prize does not violate this section.⁵

§ 874. ¹ Formerly R. S. Sec. 3894, 35 Stat. L. 1129.

² In re Jackson, 14 Blatch. 245, Fed. Cas. No. 7124; Ex Parte Jackson, 96 U. S. 724, 24 L. ed. 877; Public Clearing House v. Coyne, 194 U. S. 497, 48 L. ed. 1092, 24 S. C. 789.

³ Glass v. United States, 222 Fed. 773, 138 C. C. A. 321 (9th Cir.).

⁴ MacDaniel v. United States, 87 Fed. 324, 30 C. C. A. 670 (4th Cir.).

⁵ Waite v. Press Publishing Assn., 155 Fed. 58, 85 C. C. A. 576 (6th Cir.); United States v. Rosenblum, 121 Fed. 180; Ops. Atty.-Gen. 679; Lottery-Guessing Contests: 23 Ops. Atty.-Gen. 207, 492; 212 Fed. 662, 129 C. C. A. 198 (8th Cir.); Post Publishing Co. v. Murray, 230 Fed. 773, 145 C. C. A. 83 (1st Cir.).

Where a piano company advertised to give away a piano, to sell two at a price considerably lower than their retail value, and also minor prizes to all who answered a problem correctly, it was held that since the elements of lottery are prize, consideration, and chance, the last element was missing in this enterprise and the postmaster was therefore restrained from excluding the company's mail.⁶ A bond investment scheme, according to which only a few, determined by the order in which their applications are received, are certain to receive a return and the rest are dependent for any return upon the probability that the great majority will permit their bonds to lapse, is a scheme dependent on chance and constitutes a lottery within the meaning of this section.⁷ The terms "circular" and "letter" as used in this section mean circulars sent out by lottery companies for the purpose of advertising their schemes.⁸ A circular offering prizes to persons who should estimate nearest to the number of cigarettes on which tax is paid during a certain month as shown by the total sale of stamps by the United States Internal Revenue Department during that month is not in violation of this section.⁹ The constitutional guaranty against unreasonable search and seizure was invoked in a case arising under this section.¹⁰ Using the mails to defraud by means of promoting horse races is within this section.¹¹

§ 875. Criminal Code. Sec. 214. Postmasters Not to Be Lottery Agents.

Whoever, being a postmaster or other person employed in the postal service, shall act as agent for any lottery office, or under color of purchase or otherwise, vend lottery tickets, or shall knowingly send by mail or deliver any letter, package, postal card, circular, or pamphlet advertising any lottery, gift enterprise, or similar scheme, offering prizes

⁶ *Eastman v. Armstrong Bryd Music Co.*, 212 Fed. 662, 129 C. C. A. 198 (8th Cir.).

⁷ *United States v. McDonald*, 59 Fed. 563.

⁸ *Commerford v. Thompson*, 1 Fed. 417, 420. *Distinguished in Enterprise Saving Association v. Zum-*

stein, 67 Fed. 1000, 15 C. C. A. 153 (6th Cir.).

⁹ *United States v. Rosenblum*, 121 Fed. 180.

¹⁰ *Weeks v. United States*, 232 U. S. 383, 58 L. ed. 652, 34 S. C. 341.

¹¹ *Shea v. United States*, 149 C. C. A. 307 (6th Cir.).

dependent in whole or in part upon lot or chance, or any ticket, certificate, or instrument representing any chance, share, or interest in or dependent upon the event of any lottery, gift enterprise, or similar scheme offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes awarded by means of any such scheme, shall be fined not more than one hundred dollars, or imprisoned not more than one year, or both.¹

The term "send" or its past participle "sent" as used in this section means forwarded in the mail through the official channels of the government.²

§ 876. Criminal Code. Sec. 215. Use of Mails to Promote Frauds.

See Chapter LXII, in this book, devoted exclusively to this section.

§ 877. Criminal Code. Sec. 216. Fraudulently Assuming Fictitious Names or Addresses.

Whoever, for the purpose of conducting, promoting, or carrying on, in any manner, by means of the post-office establishment of the United States, any scheme or device mentioned in the section last preceding, or any other unlawful business whatsoever, shall use or assume, or request to be addressed by, any fictitious, false, or assumed title, name, or address, or name other than his own proper name, or shall take or receive from any post office of the United States, or station thereof, or any other authorized depository of mail matter addressed to any such fictitious, false, or assumed title, name, or address, or name other than his own proper name, shall be punished as provided in the section last preceding.¹

An indictment under this section must set out facts constituting a scheme to defraud as fully as required under Section 215. Otherwise a demurrer will be sustained.² An indictment charging de-

§ 875. ¹ Formerly R. S. Sec. 3851, 35 Stat. L. 1130.

² The Louisiana Lottery Cases, 20 Fed. 625, 628.

§ 877. ¹ 35 Stat. L. 1131.

² United States v. Hess, 124 U. S. 483, 487, 31 L. ed. 516, 8 S. C. 571; United States v. Etheredge, 140 Fed. 376.

fendant with a scheme to defraud to be effected by correspondence and that, in an attempt to do so, he deposited a letter in the post office, is insufficient to charge a violation of this section because it fails to charge an intent to use the mails to defraud otherwise than by implication.³ Under an indictment for violation of this section, defendant cannot be convicted of aiding a real person of that name in carrying out such a scheme.⁴ This section makes it a criminal offense to use the United States mails in carrying on any unlawful business under a fictitious name. Section 213 forbidding the use of the mails in promoting the lottery business, construed in *pari materia*, plainly shows the intent of Congress to make the use of the mails to promote the lottery business under an assumed name a criminal offense.⁵ Defendant testifying in his own behalf was asked on cross-examination if his former partner was not under indictment on the same charge. Over his objection, he was compelled to answer and answered affirmatively. The court held this to be reversible error.⁶ By analogy with the ruling of the Supreme Court under Section 215⁷ it would seem that each separate offense may be punishable as such. The sentence may be cumulative or concurrent; but cumulative sentences should not be inflicted except in a most flagrant case, for in many cases it may mean a life sentence for the convicted man.

§ 878. Criminal Code. Sec. 217. Poisons or Explosives not Mailable; Packing Permitted; Intoxicating Liquors; Mailing; Injurious Intent.

All kinds of poison, and all articles and compositions containing poison, and all poisonous animals, insects, and reptiles, and explosives of all kinds, and inflammable materials, and infernal machines, and mechanical, chemical, or other devices or compositions which may ignite or explode,

³ United States v. Smith, 45 Fed. 561.

⁴ Tingle v. United States, 87 Fed. 320, 30 C. C. A. 666 (5th Cir.).

⁵ MacDaniel v. United States, 87 Fed. 324, 30 C. C. A. 670 (4th Cir.).

⁶ Tingle v. United States, 87 Fed. 320, 30 C. C. A. 666 (5th Cir.).

⁷ United States v. Badders, 240 U. S. 391, 60 L. ed. 706, 36 S. C. 367. And see also Brinkman v. Morgan, 253 Fed. 553, 165 C. C. A. 223 (8th Cir.).

and all disease germs or scabs, and all other natural or artificial articles, compositions, or materials, of whatever kind, which may kill or in anywise hurt, harm, or injure another or damage, deface, or otherwise injure the mails or other property, whether sealed as first-class matter or not, are hereby declared to be nonmailable matter, and shall not be conveyed in the mails or delivered from any post office or station thereof, nor by any letter carrier; but the Postmaster General may permit the transmission in the mails, from the manufacturer thereof or dealer therein to licensed physicians, surgeons, dentists, pharmacists, druggists, and veterinarians, under such rules and regulations as he shall prescribe, of any articles hereinbefore described which are not outwardly or of their own force dangerous or injurious to life, health, or property: *Provided*, That all spirituous, vinous, malted, fermented, or other intoxicating liquors of any kind are hereby declared to be nonmailable, and shall not be deposited in or carried through the mails. Whoever shall knowingly deposit or cause to be deposited for mailing or delivery, or shall knowingly cause to be delivered by mail, according to the direction thereon or at any place at which it is directed to be delivered by the person to whom it is addressed, anything declared by this section to be nonmailable, unless in accordance with the rules and regulations hereby authorized to be prescribed by the Postmaster General, shall be fined not more than one thousand dollars or imprisoned not more than two years, or both; and whoever shall knowingly deposit or cause to be deposited for mailing or delivery, or shall knowingly cause to be delivered by mail, according to the direction thereon or at any place to which it is directed to be delivered by the person to whom it is addressed, anything declared by this section to be nonmailable, whether transmitted in accordance with the rules and regulations authorized to be prescribed by the Postmaster General or not, with the design, intent, or purpose to kill or in anywise hurt, harm, or injure another, or damage, deface, or otherwise injure the mails or other property, shall be fined not more than ten thousand dollars or imprisoned not more than twenty years, or both.¹

§ 878. ¹ Formerly R. S. Sec. 3878, May 25, 1920.
35 Stat. L. 1131, as amended by Act

The material change between the old and new section is that the Postmaster General may grant permits to certain persons to ship the prohibited articles under regulations to be prescribed by him. The penalties have also been materially increased. An indictment under this section need not state to whom the letter was sent or at what post office it was addressed, nor is it bad for duplicity because it avers "accused did deposit" and "cause to be deposited" such poison.² Where the indictment charged defendant with a violation of a postal regulation the indictment was held to be insufficient because the regulation was beyond the jurisdiction of the Postmaster-General and therefore invalid.³ The authority of the Postmaster-General to prescribe regulations for the mailing of poisons of their own force injurious to life, health, and property was limited to regulations as to "preparations and packing" thereof only. Therefore, Postoffice order No. 2923 (Feb. 23, 1910) prohibiting the mailing of medicines containing poison except for transmission from the dealer to the licensed physician, pharmacists and dentists was held to be outside the jurisdiction of the Postmaster-General and invalid.⁴

§ 879. Criminal Code. Sec. 218. Counterfeiting Money Orders.

Whoever, with intent to defraud, shall falsely make, forge, counterfeit, engrave, or print, or cause or procure to be falsely made, forged, counterfeited, engraved, or printed, or shall willingly aid or assist in falsely making, forging, counterfeiting, engraving, or printing, any order in imitation of or purporting to be a money order issued by the Post Office Department, or by any postmaster or agent thereof; or whoever shall forge or counterfeit the signature of any postmaster, assistant postmaster, chief clerk, or clerk, upon or to any money order, or postal note, or blank therefor provided or issued by or under the direction of the Post Office Department of the United States, or of any foreign country, and payable in the United States, or any material signature or indorse-

² *Murray v. United States*, 247 Fed. 874, 160 C. C. A. 96 (4th Cir.).

³ *Bruce v. United States*, 202 Fed. 98, at p. 103, 120 C. C. A. 370 (8th Cir.).

⁴ *Bruce v. United States*, 202 Fed. 98, at p. 101, 120 C. C. A. 370 (8th Cir.).

ment thereon, or any material signature to any receipt or certificate of identification thereon; or shall falsely alter, or cause or procure to be falsely altered in any material respect, or knowingly aid or assist in falsely so altering any such money order or postal notes; or shall, with intent to defraud, pass, utter, or publish any such forged or altered money order or postal note, knowing any material signature or indorsement thereon to be false, forged, or counterfeited, or any material alteration therein to have been falsely made; or shall issue any money order or postal note without having previously received or paid the full amount of money payable therefor, with the purpose of fraudulently obtaining or receiving, or fraudulently enabling any other person, either directly or indirectly, to obtain or receive from the United States, or any officer, employee, or agent thereof, any sum of money whatever; or shall, with intent to defraud the United States, or any person, transmit or present to, or cause or procure to be transmitted or presented to, any officer or employee, or at any office of the Government of the United States, any money order or postal note, knowing the same to contain any forged or counterfeited signature to the same, or to any material indorsement, receipt, or certificate thereon, or material alteration therein unlawfully made, or to have been unlawfully issued without previous payment of the amount required to be paid upon such issue, shall be fined not more than five thousand dollars, or imprisoned not more than five years, or both.¹

A memorandum book found in the possession of a person establishes a presumption that the book is his. Therefore, on the trial of an offense under this section, such book may be admitted in evidence. An entry reading: "Macon 45 Sat. 12/26" was allowed in evidence and held to be a memorandum by the defendant that he was in Macon on December 26th. Other evidence was also examined and held to be sufficient to send the case to the jury.² The crime defined in this statute is the common-law crime of forgery, with reference to a postal

§ 879. ¹ Formerly R. S. Sec. 5463,
35 Stat. L. 1131.

² *Dean v. United States*, 246 Fed.
568, 158 C. C. A. 538 (5th Cir.).

money order.³ It has generally been held that the forging and uttering of a forged instrument are parts of a single transaction. Therefore, it was held that, under an indictment which charges the forging of the instrument in the first count, and the uttering in the second count, there can be but one sentence after trial and the general verdict of guilty; the sentence under the second count being void.⁴ A defendant having pleaded guilty to an offense under Section 210 of the Criminal Code, cannot be put on trial again under that section for issuing six other orders, as all were a part of one transaction and issued to one person. But he may be prosecuted for issuing the same orders, or any one or more of them under Section 218.⁵ Where the accused pleaded guilty to forging eight postal money orders, he can be sentenced to five years for each offense and hence a sentence for ten years to run concurrently for all eight offenses is valid.⁶

§ 880. Criminal Code. Sec. 219. Counterfeiting Postage Stamps.

Whoever shall forge or counterfeit any postage stamp, or any stamp printed upon any stamped envelope, or postal card, or any die, plate, or engraving therefor; or shall make or print, or knowingly use or sell, or have in possession with intent to use or sell, any such forged or counterfeited postage stamp, stamped envelope, postal card, die, plate, or engraving; or shall make, or knowingly use or sell, or have in possession with intent to use or sell, any paper bearing the watermark of any stamped envelope, or postal card, or any fraudulent imitation thereof; or shall make or print, or authorize or procure to be made or printed, any postage stamp, stamped envelope, or postal card, of the kind authorized and provided by the Post Office Department, without the special authority and direction of said department; or shall, after such postage stamp, stamped

³ Ex parte Hibbs, 26 Fed. 421.

⁴ United States v. Carpenter, 151 Fed. 214, 81 C. C. A. 194 (9th Cir.), but compare United States v. Badders, 240 U. S. 391, 60 L. ed. 706, 36 S. C. 367; Brinkman v. Morgan, 253 Fed. 553, 165 C. C. A. 223 (8th Cir.).

⁵ United States v. Komie, 194 Fed. 567, citing authorities. See Brinkman v. Morgan, 253 Fed. 553, — C. C. A. — (8th Cir.).

⁶ Brinkman v. Morgan, 253 Fed. 553, — C. C. A. — (8th Cir.).

envelope, or postal card has been printed, with intent to defraud, delivered the same to any person not authorized by an instrument in writing, duly executed under the hand of the Postmaster-General and the seal of the Post Office Department, to receive it, shall be fined not more than five hundred dollars, or imprisoned not more than five years, or both.¹

§ 881. Criminal Code. Sec. 220. Counterfeiting, etc., Foreign Stamps.

Whoever shall forge, or counterfeit, or knowingly utter or use any forged or counterfeited postage stamp of any foreign government, shall be fined not more than five hundred dollars, or imprisoned not more than five years, or both.¹

§ 882. Criminal Code. Sec. 221. Inclosing Higher Class in Lower Class Matter.

Matter of the second, third, or fourth class containing any writing or printing in addition to the original matter, other than as authorized by law, shall not be admitted to the mails, nor delivered, except upon payment of postage for matter of the first class, deducting therefrom any amount which may have been prepaid by stamps affixed, unless by direction of the Postmaster-General such postage shall be remitted. Whoever shall knowingly conceal or inclose any matter of a higher class in that of a lower class, and deposit or cause the same to be deposited for conveyance by mail, at a less rate than would be charged for such higher class matter, shall be fined not more than one hundred dollars.¹

The expression "cause to be deposited for conveyance by mail" as used in this section means the sending of mail to the post office, and this term should be distinguished from the verb "send" or its past participle "sent", which means forwarded in the mail through the offices of the government.²

§ 880. ¹ Formerly R. S. Sec. 5464,
35 Stat. L. 1132.

§ 881. ¹ Formerly R. S. Sec. 5465,
35 Stat. L. 1132.

§ 882. ¹ Formerly R. S. Sec. 3887,
35 Stat. L. 1132.

² The Louisiana Lottery Cases,
20 Fed. 625, 628.

§ 883. Criminal Code. Sec. 222. Postmaster Illegally Approving Bond, etc.

Whoever, being a postmaster, shall affix his signature to the approval of any bond of a bidder, or to the certificate of sufficiency of sureties in any contract, before the said bond or contract is signed by the bidder or contractor and his sureties, or shall knowingly, or without the exercise of due diligence, approve any bond of a bidder with insufficient sureties, or shall knowingly make any false or fraudulent certificate, shall be forthwith dismissed from office and be thereafter disqualified from holding the office of postmaster; and shall also be fined not more than five thousand dollars, or imprisoned not more than one year, or both.¹

§ 884. Criminal Code. Sec. 223. False Evidence as to Second-class Matter.

Whoever shall knowingly submit or cause to be submitted to any postmaster or to the Post Office Department or any officer of the postal service, any false evidence relative to any publication for the purpose of securing the admission thereof at the second-class rate, for transportation in the mails, shall be fined not more than five hundred dollars.¹

A publication to be entitled to second-class rates must be published for the dissemination of information of a public character and subscriptions taken at more than a nominal price.² In a case where a defendant was held for violation of this section the court said: "Congress had the right to confer on the Postmaster-General authority to prevent the mails being used as a medium to disseminate printed matter which on the grounds of public policy has been declared non-mailable. Furthermore, since the right to use the mails is a statutory privilege only its withdrawal is not a deprivation of property without due process of law."³

§ 885. Criminal Code. Sec. 224. Inducing or Prosecuting False Claims.

Whoever shall make, allege, or present, or cause to be made, alleged, or presented, or assist, aid, or abet in making,

¹ § 883. ¹ Formerly R. S. Sec. 3947, 35 Stat. L. 1133.

² § 884. ¹ 35 Stat. L. 1133.

² Myrick v. United States, 219 Fed. 1, 134 C. C. A. 619 (1st Cir.).

³ Missouri Drug Co. v. Wyman, 129 Fed. 623, 627.

alleging, or presenting, any claim or application for indemnity for the loss of any registered letter, parcel, package, or other article or matter or the contents thereof, knowing such claim or application to be false, fictitious, or fraudulent; or whoever for the purpose of obtaining or aiding to obtain the payment or approval of any such claim or application, shall make or use, or cause to be made or used, any false statement, certificate, affidavit, or deposition; or whoever shall knowingly and willfully conceal any material fact or circumstance in respect of any such claim or application for indemnity, shall be fined not more than five hundred dollars, or imprisoned not more than one year, or both.¹

§ 886. Criminal Code. Sec. 225. Misappropriation of Postal Funds or Property.

Whoever, being a postmaster or other person employed in or connected with any branch of the postal service, shall loan, use, pledge, hypothecate, or convert to his own use, or shall deposit in any bank, or exchange for other funds or property, except as authorized by law, any money or property coming into his hands or under his control in any manner whatever, in the execution or under color of his office, employment, or service, whether the same shall be the money or property of the United States or not; or shall fail or refuse to remit to or deposit in the Treasury of the United States or in a designated depository, or to account for or turn over to the proper officer or agent; any such money or property, when required so to do by law or the regulations of the Post Office Department, or upon demand or order of the Postmaster-General, either directly or through a duly authorized officer or agent, shall be deemed guilty of embezzlement; and every such person, as well as every other person advising or knowingly participating therein, shall be fined in a sum equal to the amount or value of the money or property embezzled, or imprisoned not more than ten years, or both. Any failure to produce or to pay over any such money or property, when required so to do as above provided, shall be taken to be *prima facie* evidence of such embezzlement; and upon the trial of any indictment against any person for such

§ 885. ¹ 35 Stat. L. 1133.

embezzlement, it shall be *prima facie* evidence of a balance against him to produce a transcript from the account books of the Auditor for the Post Office Department. But nothing herein shall be construed to prohibit any postmaster depositing, under the direction of the Postmaster-General, in a national bank designated by the Secretary of the Treasury for that purpose, to his own credit as postmaster, any funds in his charge, nor prevent his negotiating drafts or other evidences of debt through such bank, or through United States disbursing officers, or otherwise, when instructed or required so to do by the Postmaster-General, for the purpose of remitting surplus funds from one post-office to another.¹

An indictment under this section charging defendant with the embezzlement of money of the United States is bad where it does not allege that he was a clerk or employee of the Government, or that the money came lawfully into his possession by virtue of some employment.² Although all three counts may be based on the same shortage, the jury can convict on all three as the same transaction may constitute all three offenses.³ A clerk in charge of a branch post office station authorized to issue money orders payable at other stations is intrusted in his official capacity with the custody of the funds. He is guilty of embezzlement when he issues money orders in payment of his private debts.⁴ In an indictment under this section, it was held that the word "willful" implies, on the part of a defendant, knowledge and a purpose to do a wrong.⁵ Money received by a rural letter carrier from patrons of his route to be used in the purchase and forwarding of money-orders while in the possession of such carrier and before surrender at the post office, does not constitute "money order funds" for the embezzlement of which the carrier can be prosecuted under this section.⁶ The offense under this section is committed,

§ 886. ¹ Formerly R. S. Sec. 4046 and 4053, 35 Stat. L. 1133.

² *United States v. Allen*, 150 Fed. 152; *Moore v. United States*, 160 U. S. 268, 40 L. ed. 422, 16 S. C. 294.

³ *Foster v. United States*, 256 Fed. 207, — C. C. A. — (5th Cir.).

⁴ *United States v. Royer*, 122 Fed. 844.

⁵ *Foster v. United States*, 256 Fed. 207, — C. C. A. — (5th Cir.).

⁶ *United States v. Mann*, 160 Fed. 552.

though a postmaster who issued money orders, without receiving money therefor, did not intend to defraud the government, but to account for the money on his settlement, and the want of fraudulent intent is no defense.⁷

§ 887. Criminal Code. Sec. 226. Employees Not to Be Interested in Contracts.

Whoever, being a person employed in the postal service, shall become interested in any contract for carrying the mail, or act as agent, with or without compensation, for any contractor or person offering to become a contractor in any business before the Department, shall be immediately dismissed from office, and shall be fined not more than five thousand dollars, or imprisoned not more than one year, or both.¹

§ 888. Criminal Code. Sec. 227. Fraudulent Use of Official Envelopes.

Whoever shall make use of any official envelope, label, or indorsement authorized by law, to avoid the payment of postage or registry fee on his private letter, packet, package, or other matter in the mail, shall be fined not more than three hundred dollars.¹

§ 889. Criminal Code. Sec. 228. Fraudulent Increase of Weight of Mail.

Whoever shall place or cause to be placed any matter in the mails during the regular weighing period for the purpose of increasing the weight of the mail, with intent to cause an increase in the compensation of the railroad mail carrier over whose route such mail may pass, shall be fined not more than twenty thousand dollars, or imprisoned not more than five years, or both.¹

§ 890. Criminal Code. Sec. 229. Offenses against Foreign Mail in Transit.

Every foreign mail shall, while being transported across the territory of the United States under authority of law,

⁷ *Vives v. United States*, 92 Fed. 355, 34 C. C. A. 403 (5th Cir.).

§ 888. ¹ 35 Stat. L. 1134.

§ 889. ¹ 35 Stat. L. 1134.

§ 887. ¹ Formerly R. S. Sec. 412, 35 Stat. L. 1134.

be taken and deemed to be a mail of the United States so far as to make any violation thereof, or depredation thereon, or offense in respect thereto, or any part thereof, an offense of the same grade, and punishable in the same manner and to the same extent as though the mail was a mail of the United States; and in any indictment or information for any such offense, the mail, or any part thereof, may be alleged to be, and on the trial of any such indictment or information it shall be deemed and held to be, a mail or part of a mail of the United States.¹

§ 891. Criminal Code. Sec. 230. Omission to Take Oath.

Every person employed in the postal service shall be subject to all penalties and forfeitures for the violation of the laws relating to such service, whether he has taken the oath of office or not.¹

§ 892. Criminal Code. Sec. 231. Definitions.

The words "postal service," wherever used in this chapter, shall be held and deemed to include the "Post Office Department."¹

§ 890. ¹ Formerly R. S. Sec. 4013,
35 Stat. L. 1134.

§ 891. ¹ Formerly R. S. Sec. 3832,
35 Stat. L. 1134.

§ 892. ¹ 35 Stat. L. 1134.

CHAPTER LIV

CRIMINAL CODE, CHAPTER NINE

OFFENSES AGAINST FOREIGN AND INTERSTATE COMMERCE

- § 893. Crim. Code § 232. Dynamite, etc., Not to Be Carried on Vessels or Vehicles Carrying Passengers for Hire.
- § 894. Crim. Code § 233. Interstate Commerce Commission to Make Regulations for Transportation of Explosives.
- § 895. Crim. Code § 234. Liquid Nitroglycerine, etc., Not to Be Carried on Certain Vessels and Vehicles.
- § 896. Crim. Code § 235. Marking of Packages of Explosives; Deceptive Marking.
- § 897. Crim. Code § 236. Death or Bodily Injury Caused by Such Transportation.
- § 898. Crim. Code § 237. Importation and Transportation of Lottery Tickets, etc., Forbidden.
- § 899. Crim. Code § 238. Interstate Shipment of Intoxicating Liquors; Delivery of to Be Made Only to *Bona Fide* Consignee.
- § 900. Crim. Code § 239. Common Carrier, etc., Not to Collect Purchase Price of Interstate Shipment of Intoxicating Liquors.
- § 901. Crim. Code § 240. Packages Containing Intoxicating Liquors Shipped in Interstate Commerce to Be Marked as Such.
- § 902. Crim. Code § 241. Importation of Certain Wild Animals and Birds Forbidden.
- § 903. Crim. Code § 242. Transportation of Prohibited Animals.
- § 904. Crim. Code § 243. Marking of Packages.
- § 905. Crim. Code § 244. Penalty for Violation of Three Preceding Sections.
- § 906. Crim. Code § 245. Importation and Transportation of Obscene, etc., Books, etc.

§ 893. Criminal Code. Sec. 232. Dynamite, etc., Not to Be Carried on Vessels or Vehicles Carrying Passengers for Hire.

It shall be unlawful to transport, carry, or convey, any dynamite, gunpowder, or other explosive, between a place

in a foreign country and a place within or subject to the jurisdiction of the United States, or between a place in any State, Territory, or District of the United States, or place non-contiguous to but subject to the jurisdiction thereof, and a place in any other State, Territory, or District of the United States, or place non-contiguous to but subject to the jurisdiction thereof, on any vessel or vehicle of any description operated by a common carrier, which vessel or vehicle is carrying passengers for hire: *Provided*, That it shall be lawful to transport on any such vessel or vehicle small arms ammunition in any quantity, and such fuses, torpedoes, rockets, or other signal devices, as may be essential to promote safety in operation, and properly packed and marked samples of explosives for laboratory examination, not exceeding a net weight of one half pound each, and not exceeding twenty samples at one time in a single vessel or vehicle; but such samples shall not be carried in that part of a vessel or vehicle which is intended for the transportation of passengers for hire: *Provided, further*, That nothing in this section shall be construed to prevent the transportation of military or naval forces with their accompanying munitions of war on passenger equipment vessels or vehicles.¹

This section and Section 236 are designed to protect the lives of passengers and to prevent the use of instrumentalities of interstate and foreign commerce in aid of crimes which involve the use of high explosives. It is the mode of conveyance, rather than the transportation itself, which is the gravamen of the offense. Under Section 335 the crime is made a felony.² The offense is an independent one and unconnected with the use of the explosives after reaching destination. It is no defense that the accused is an officer of a foreign country transporting the explosives for use in an alleged justifiable act of war in another country.³ A freight train may be regarded as a passenger train when passengers are

§ 893. ¹ Formerly R. S. Sec. 5353, 35 Stat. L. 1134.

² *Horn v. Mitchell*, 232 Fed. 819, 147 C. C. A. 13 (1st Cir.). *Appeal dismissed* in *Horn v. Mitchell*, 243 U. S. 247, 61 L. ed. 700, 37 S. C. 293; *John*

Lysaght Ltd. v. Lehigh Valley R. R. Co., 254 Fed. 351, and *see* note 6.

³ *Horn v. Mitchell*, 232 Fed. 819, 147 C. C. A. 13 (1st Cir.). *Appeal dismissed* in 243 U. S. 247, 61 L. ed. 700, 37 S. C. 293.

conveyed thereon for compensation by authority of the railway company.⁴ Nitroglycerine includes dynamite,⁵ but dynamite was not specified in the former section although nitroglycerine was. This section and Section 235 apply alike to common carriers, their employees, and any person traveling in vehicles carrying passengers for hire.⁶ A conviction under this section cannot be reviewed or set aside by *habeas corpus*, particularly after the conviction has been sustained on writ of error.⁷ Loading dynamite, gunpowder, naphtha, and other inflammable or explosive substances is necessary to commerce and is not a nuisance,⁸ provided the regulations are fully complied with.

§ 894. Criminal Code. Sec. 233. Interstate Commerce Commission to Make Regulations for Transportation of Explosives.

The Interstate Commerce Commission shall formulate regulations for the safe transportation of explosives, which shall be binding upon all common carriers engaged in interstate or foreign commerce which transport explosives by land. Said commission, of its own motion, or upon application made by any interested party, may make changes or modifications in such regulations, made desirable by new information or altered conditions. Such regulations shall be in accord with the best known practicable means for securing safety in transit, covering the packing, marking, loading, handling while in transit, and the precautions necessary to determine whether the material when offered is in proper condition to transport. Such regulations, as well as all changes or modifications thereof, shall take effect ninety days after their formulation and publication by said commission and shall be in effect until reversed, set aside, or modified.¹

⁴ United States v. Saul, 58 Fed. 763.

⁵ United States v. Saul, 58 Fed. 763.

⁶ Ryan v. United States, 216 Fed. 13, 132 C. C. A. 257 (7th Cir.).

⁷ Cooley v. Morgan, 221 Fed. 252, 136 C. C. A. 210 (8th Cir.).

⁸ The Ingrid, 195 Fed. 596; Actieselskabet Ingrid v. Central R. R. Co.

of New Jersey, 216 Fed. 72, 132 C. C. A. 316 (2d Cir.); Joseph R. Foard Co. v. Maryland, 219 Fed. 827, 833, 135 C. C. A. 497 (4th Cir.); State of Maryland, to use of Goralski v. General Stevedoring Co., 213 Fed. 51, 70.

§ 894. ¹ 35 Stat. L. 1135.

Shipments of explosives in interstate or foreign commerce are subject exclusively to the regulations of the Interstate Commerce Commission and State laws, and local ordinances do not apply.² In an indictment under this section the accused cannot set up as a defense that he was an officer of a foreign country engaged in war.³

§ 895. Criminal Code. Sec. 234. Liquid Nitroglycerine, etc., Not to Be Carried on Certain Vessels and Vehicles.

It shall be unlawful to transport, carry, or convey, liquid nitroglycerine, fulminate in bulk in dry condition, or other like explosive, between a place in a foreign country and a place within or subject to the jurisdiction of the United States, or between a place in one State, Territory, or District of the United States, or place non-contiguous to but subject to the jurisdiction thereof, and a place in any other State, Territory, or District of the United States, or a place non-contiguous to but subject to the jurisdiction thereof, on any vessel or vehicle of any description operated by a common carrier in the transportation of passengers or articles of commerce by land or water.¹

Petitioner being indicted for a violation of this section applied for a writ of *habeas corpus* to the District Court. The writ was refused and the Circuit Court of Appeals affirmed the decision. The petitioner appealed to the United States Supreme Court on the ground that, he being a German officer, constitutional and treaty questions were involved. The court dismissed the appeal on the ground that the appeal should have been taken directly to the United States Supreme Court from the District Court.² The fact that the defendant was an officer of a foreign nation and that the explosives were transported for his government for war purposes, is no defense, as the object of the statute

² *Actiesselskabet Ingrid v. Central R. R. Co. of New Jersey*, 216 Fed. 72, 132 C. C. A. 316 (2d Cir.); *The Ingrid*, 195 Fed. 596; *Horn v. Mitchell*, 232 Fed. 819, 147 C. C. A. 13 (1st Cir.). *Appeal dismissed in*

243 U. S. 247, 61 L. ed. 700, 37 S. C. 293.

³ *Horn v. Mitchell, supra*.

§ 895. ¹ 35 Stat. L. 1135.

² *Horn v. Mitchell*, 243 U. S. 247, 61 L. ed. 700, 37 S. C. 293.

is to safeguard the safety of the traveling public.³ Compliance by a carrier in its transportation of war munitions with the requirements of the Criminal Code, Sections 232-235, does not affect its civil liability in respect to loss or damage to property of other shippers through an explosion of such munitions.⁴

§ 896. Criminal Code. Sec. 235. Marking of Packages of Explosives; Deceptive Marking.

Every package containing explosives or other dangerous articles when presented to a common carrier for shipment shall have plainly marked on the outside thereof the contents thereof; and it shall be unlawful for any person to deliver, or cause to be delivered, to any common carrier engaged in interstate or foreign commerce by land or water, for interstate or foreign transportation, or to carry upon any vessel or vehicle engaged in interstate or foreign transportation, any explosive, or other dangerous article, under any false or deceptive marking, description, invoice, shipping order, or other declaration, or without informing the agent of such carrier of the true character thereof, at or before the time such delivery or carriage is made. Whoever shall knowingly violate, or cause to be violated, any provision of this section, or of the three sections last preceding, or any regulation made by the Interstate Commerce Commission in pursuance thereof, shall be fined not more than two thousand dollars, or imprisoned not more than eighteen months, or both.¹

Under Section 335, violations of Sections 232 to 235 are felonies.²

§ 897. Criminal Code. Sec. 236. Death or Bodily Injury Caused by Such Transportation.

When the death or bodily injury of any such person is caused by the explosion of any article named in the four

³ *Horn v. Mitchell*, 232 Fed. 819, 147 C. C. A. 13 (1st Cir.). See also *Ryan v. United States*, 216 Fed. 13, 132 C. C. A. 257 (7th Cir.), for matters of practice under an indictment for the violation of this section.

⁴ *John Lysaght Ltd. v. Lehigh Valley R. R. Co.*, 254 Fed. 351.

§ 896. ¹ Formerly R. S. Sec. 5355, 35 Stat. L. 1135.

² *Horn v. Mitchell*, 232 Fed. 819, 147 C. C. A. 13 (1st Cir.). *Appeal dismissed* in 243 U. S. 247, 61 L. ed. 37 S. C. 293.

sections last preceding, while the same is being placed upon any vessel or vehicle to be transported in violation thereof, or while the same is being so transported, or while the same is being removed from such vessel or vehicle, the person knowingly placing, or aiding or permitting the placing, of such articles upon any such vessel or vehicle, to be so transported, shall be imprisoned not more than ten years.¹

Sections 232-236 were designed for the protection of passengers and as a safeguard for the prevention of the use of interstate and foreign commerce in aid of crimes which involve the use of high explosives. Their violation was regarded by Congress as of such a serious character as to rank as a felony.²

§ 898. Criminal Code. Sec. 237. Importation and Transportation of Lottery Tickets, etc., Forbidden.

Whoever shall bring or cause to be brought into the United States or any place subject to the jurisdiction thereof, from any foreign country, for the purpose of disposing of the same, any paper, certificate, or instrument purporting to be or to represent a ticket, chance, share, or interest in or dependent upon the event of a lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any advertisement of, or list of the prizes drawn or awarded by means of, any such lottery, gift enterprise, or similar scheme; or shall therein knowingly deposit or cause to be deposited with any express company or other common carrier for carriage, or shall carry, from one State, Territory, or District of the United States, or place non-contiguous to but subject to the jurisdiction thereof, to any other State, Territory, or District of the United States or place non-contiguous to but subject to the jurisdiction thereof, or from any place in or subject to the jurisdiction of the United States through a foreign country to any place in or subject to the jurisdiction thereof, or from any place in or subject to the jurisdiction of the United States to a foreign country, any paper, certificate, or instrument purporting to be or to represent a ticket, chance, share, or

§ 897. ¹ Formerly R. S. Sec. 5354,
700, 35 Stat. L. 1136.

² *Horn v. Mitchell*, 232 Fed. 819,
147 C. C. A. 13 (1st Cir.).

interest in or dependent upon, the event of any such lottery, gift enterprise, or similar scheme, or any advertisement of, or list of the prizes drawn or awarded by means of, any such lottery, gift enterprise, or similar scheme, or shall knowingly take or receive, or cause to be taken or received, any such paper, certificate, instrument, advertisement, or list so brought, deposited, or transported, shall, for the first offense, be fined not more than one thousand dollars, or imprisoned not more than two years, or both; and for any subsequent offense shall be imprisoned not more than two years.¹

The act from which this section is drawn was held constitutional.² The statute is to be strictly construed.³ It was not intended to forbid carriage through a State.⁴ Documents showing the result of a drawing do not come within the act,⁵ nor does a duplicate of a ticket issued, retained by the agent.⁶ Coupons in food products based on chance were held to be lottery schemes.⁷ The three necessary elements of a "lottery" are the furnishing of a consideration, the offering of a prize, and the distribution of the prize by chance rather than entirely upon a basis of merit.⁸

§ 899. Criminal Code. Sec. 238. Interstate Shipment of Intoxicating Liquors; Delivery of to Be Made Only to *Bona Fide* Consignee.

Any officer, agent, or employee of any railroad company, express company, or other common carrier, who shall knowingly deliver or cause to be delivered to any person other than the person to whom it has been consigned, unless upon the written order in each instance of the *bona fide* consignee, or to any fictitious person, or to any person

§ 898. ¹ 35 Stat. L. 1136.

² Lottery Case, 188 U. S. 321, 47 L. ed. 492, 23 S. C. 321; Reilly v. United States, 106 Fed. 896, 46 C. C. A. 25 (6th Cir.). *Reversed* on other grounds, 188 U. S. 375, 47 L. ed. 508, 23 S. C. 334.

³ France v. United States, 164 U. S. 676, 682, 41 L. ed. 595, 17 S. C. 219; United States v. Whelpley, 125 Fed. 616.

⁴ United States v. Whelpley, 125 Fed. 616.

⁵ France v. United States, 164 U. S. 676, 41 L. ed. 595, 17 S. C. 219.

⁶ Francis v. United States, 188 U. S. 375, 47 L. ed. 508, 23 S. C. 334.

⁷ United States v. Jefferson, 134 Fed. 299; United States v. McKenna, 149 Fed. 252.

⁸ Brooklyn Daily Eagle v. Voorhies, 181 Fed. 579.

under a fictitious name, any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind which has been shipped from one State, Territory, or District of the United States, or place non-contiguous to but subject to the jurisdiction thereof, into any other State, Territory, or District of the United States, or place non-contiguous to but subject to the jurisdiction thereof, or from any foreign country into any State, Territory, or District of the United States, or place non-contiguous to but subject to the jurisdiction thereof, shall be fined not more than five thousand dollars, or imprisoned not more than two years, or both.¹

A person may be held under this section for conspiring to commit the offense although he did not directly participate in the commission of it.² After the trial has commenced, counsel for the accused cannot object to the introduction of any evidence in the case on the ground that the indictment did not state any offense against the laws of the United States. A motion to quash, or in arrest, or a demurrer should be resorted to.³ In an indictment under this section, the court held that granting or refusing a continuance rests in its discretion.⁴ Where a conspiracy had been formed to violate this section by causing an interstate shipment to be made for the purpose of having an agent of the carrier deliver it to a fictitious person, telegraphic orders by one conspirator to another directing the shipments to be made are overt acts within Section 37.⁵ Where a carrier admits the identity of the consignee, it cannot escape liability for refusal to deliver intoxicating liquors on the ground that delivery was prohibited by this section.⁶ This section was neither repealed nor suspended by the Webb Kenyon Act.⁷ Sections 238-240 were added to the Criminal Code during its passage in the House of Representatives.

§ 899. ¹ 35 Stat. L. 1136.

² McKnight v. United States, 252 Fed. 687, 164 C. C. A. 527 (8th Cir.).

³ McKnight v. United States, 252 Fed. 687, 164 C. C. A. 527 (8th Cir.); Grant v. United States, 252 Fed. 692, 164 C. C. A. 532 (8th Cir.).

⁴ Bond v. United States, 252 Fed. 804, 164 C. C. A. 644 (8th Cir.).

⁵ Witte v. Shelton, 240 Fed. 265, 153 C. C. A. 191 (8th Cir.).

⁶ Jefferson v. Southern Express Co., 103 S. C. 75, 87 S. E. 209; but consult Volstead Act.

⁷ Witte v. Shelton, 240 Fed. 265, 153 C. C. A. 191 (8th Cir.); but compare with Volstead Act.

They form the substance of the Knox bill as enlarged in the House; they were retained by the Conference Committee without any debate on the floor of either House.⁸ Sections 238 and 239 together with the other legislation by Congress on the subject exclude all state legislation attempting to regulate interstate traffic in intoxicating liquors.⁹ Transportation is not completed until the shipment reaches its destination.¹⁰ An indictment will lie also against persons other than the agents of the common carrier, who aid and abet in the commission of the offense, as principals before the fact.¹¹

§ 900. Criminal Code. Sec. 239. Common Carriers, etc., Not to Collect Purchase Price of Interstate Shipment of Intoxicating Liquors.

Any railroad company, express company, or other common carrier, or any other person who, in connection with the transportation of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one State, Territory, or District of the United States, or place non-contiguous to but subject to the jurisdiction thereof, into any other State, Territory, or District of the United States, or place non-contiguous to but subject to the jurisdiction thereof, or from any foreign country into any State, Territory, or District of the United States, or place non-contiguous to but subject to the jurisdiction thereof, shall collect the purchase price or any part thereof, before, on, or after delivery, from the consignee or from any other person, or shall in any manner act as the agent of the buyer or seller of any such liquor, for the purpose of buying or selling or completing the sale thereof, saving only in the actual transportation and delivery of the same, shall be fined not more than five thousand dollars.¹

It is duplicitous to charge a defendant in a single count with conspiracy to evade payment of the internal revenue tax required

⁸ *United States v. Elghty-seven Barrels etc. of Wine*, 180 Fed. 215.

⁹ *Palmer v. Southern Express Co.*, 129 Tenn. 116, 165 S. W. 236.

¹⁰ *Danciger v. Cooley*, 248 U. S. 319, 63 L. ed. 339, 19 S. C. 119.

¹¹ *Billingsley v. United States*, 249 Fed. 331, 161 C. C. A. 339 (9th Cir.).
§ 900. ¹ 35 Stat. L. 1136.

to be paid by persons engaged in the liquor business in violation of the statutes and also with conspiracy to violate this section, as charging in the same count two distinct offenses for which different penalties are provided.² The Supreme Court has held that the acts of an agent who collected drafts from the consignees of the liquor before turning it over were embraced by this section.³ The act of a bank in collecting from the purchaser a draft attached to a bill of lading for liquor transported in interstate commerce is not in connection with the interstate transportation of the liquor, and is not within the section.⁴ The power of a State to control interstate C.O.D. shipments prior to the enactment of the Penal Code cannot be deduced from this section, prohibiting them.⁵

§ 901. Criminal Code. Sec. 240. Packages Containing Intoxicating Liquors Shipped in Interstate Commerce to Be Marked as Such.

Whoever shall knowingly ship or cause to be shipped, from one State, Territory, or District of the United States, or place non-contiguous to but subject to the jurisdiction thereof, into any other State, Territory, or District of the United States, or place non-contiguous to but subject to the jurisdiction thereof, or from any foreign country into any State, Territory, or District of the United States, or place non-contiguous to but subject to the jurisdiction thereof, any package of or package containing any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, unless such package be so labeled on the outside cover as to plainly show the name of the consignee, the nature of its contents, and the quantity contained therein, shall be fined not more than five thousand dollars; and such liquor shall be forfeited to the United States, and may be seized and condemned by like proceedings as those

² John Gund Brewing Co. v. United States, 204 Fed. 17, 122 C. A. 331 (8th Cir.).

³ Danciger v. Cooley, 248 U. S. 319, 63 L. ed. 139, 39 S. C. 119.

⁴ Danciger v. Stone, 188 Fed. 510; First National Bank of Ana-

moose v. United States, 206 Fed. 374, 124 C. C. A. 256 (8th Cir.), reversing 190 Fed. 336.

⁵ Rosenberger v. Pacific Express Co., 241 U. S. 48, 60 L. ed. 880, 36 S. C. 510.

provided by law for the seizure and forfeiture of property imported into the United States contrary to law.¹

There is nothing in the statute to prevent the addition of any label to a barrel of liquor as long as the description, the quantity, and the name of the consignee are stated thereon.² Where wholesale merchants, after collecting enough orders from individual purchasers to make carload shipments, labeled each container with its own name, the character and quantity of the liquor, and the name of the purchaser, and consigned the car to itself or to its own order with directions to the carrier to notify the purchasers, the shipper was the consignee, and, the names of the purchasers being mere surplusage, the act was not violated.³ "Consignee" in the statute must be taken in its ordinary signification, meaning that person or corporation to whom the carrier may lawfully make delivery of the consigned goods in accordance with its contract of carriage. The deliverer need not be the owner; he may be a mere bailee, gratuitous or otherwise, a vendee, a commission merchant, or a mere agent of the shipper, or even a swindler, who has deceived the shipper into sending him goods to which he can assert no legal or equitable title.⁴ The effect of this section is to make State regulations as to the marking of such packages invalid.⁵ The statute means that the markings are to be manifest and of self-evident import and excludes the idea of reference elsewhere for information or a general knowledge of trade-names or brands.⁶ The act is essentially a continuing act the performance of which is begun when the package is delivered to the carrier and completed when it reaches its destination. Therefore, the District Court within the State into which the liquor is shipped has jurisdiction of the offense under § 42, Judicial Code, as well as the District Court within the State

§ 901. ¹ 35 Stat. L. 1137; but see Volstead Act.

² United States v. Eighty-seven Barrels etc. of Wine, 180 Fed. 215.

³ United States v. Eighty-seven Barrels etc. of Wine, *supra*.

⁴ United States v. Eighty-seven Barrels etc. of Wine, *supra*; Great

Northern Pac. S. S. Co. v. Rainier Brewing Co., 255 Fed. 762, — C. C. A. — (9th Cir.).

⁵ Chicago, Burlington & Quincy R. R. Co. v. Giles, 235 Fed. 804.

⁶ Jacob Schmidt Brewing Co. v. United States, 254 Fed. 695, — C. C. A. — (8th Cir.).

from which it is shipped.⁷ Any attempt to evade the law by failing to set forth the particulars truthfully, or to disclose them plainly, or to cover up with advertising matter the facts which the law requires the label to reveal, so as readily to catch the eye, violates the statute; but it is sufficient to describe the contents as intoxicating liquor, without specifying the particular kind of liquor.⁸

§ 902. Criminal Code. Sec. 241. Importation of Certain Wild Animals and Birds Forbidden.

The importation into the United States, or any Territory or District thereof, of the mongoose, the so-called "flying-foxes" or fruit bats, the English sparrow, the starling, and such other birds and animals as the Secretary of Agriculture may from time to time declare to be injurious to the interests of agriculture or horticulture, is hereby prohibited; and all such birds and animals shall, upon arrival at any port of the United States, be destroyed or returned at the expense of the owner. No person shall import into the United States or into any Territory or District thereof, any foreign wild animal or bird, except under special permit from the Secretary of Agriculture; *Provided*, That nothing in this section shall restrict the importation of natural history specimens for museums or scientific collections, or of certain cage birds, such as domesticated canaries, parrots, or such other birds as the Secretary of Agriculture may designate. The Secretary of the Treasury is hereby authorized to make regulations for carrying into effect the provisions of this section.¹

§ 903. Crim. Code. Sec. 242. Transportation of Prohibited Animals.

It shall be unlawful for any person to deliver to any common carrier for transportation, or for any common carrier to transport from any State, Territory, or District of the United States, to any other State, Territory, or District thereof, any foreign animals or birds, the importation of which is prohibited, or the dead bodies or parts thereof

⁷ United States v. Freeman, 239 U. S. 117, 60 L. ed. 172, 36 S. C. 32.

⁸ United States v. Hillsdale Distillery Co., 242 Fed. 536.

§ 902. ¹ 35 Stat. L. 1137.

of any wild animals or birds, where such animals or birds have been killed or shipped in violation of the laws of the State, Territory, or District in which the same were killed, or from which they were shipped: *Provided*, That nothing herein shall prevent the transportation of any dead birds or animals killed during the season when the same may be lawfully captured, and, the export of which is not prohibited by law in the State, Territory, or District in which the same are captured or killed: *Provided further*, That nothing herein shall prevent the importation, transportation, or sale of birds or bird plumage manufactured from the feathers of barnyard fowls.¹

This section has been held to be valid.² The section has reference to shipments actually instituted, and not to those merely contemplated.³ An indictment alleging that the quail were killed with the intent and purpose of being shipped out of the territory is sufficient although it does not allege the months in which this occurred.⁴

§ 904. Criminal Code. Sec. 243. Marking of Packages.

All packages containing the dead bodies or the plumage, or parts thereof, of game animals, or game or other wild birds, when shipped in interstate or foreign commerce, shall be plainly and clearly marked, so that the name and address of the shipper, and the nature of the contents, may be readily ascertained on an inspection of the outside of such package.¹

§ 905. Criminal Code. Sec. 244. Penalty for Violation of Three Preceding Sections.

For each evasion or violation of any provision of the three sections last preceding, the shipper shall be fined not more than two hundred dollars; the consignee knowingly receiving such articles so shipped and transported in violation of said sections shall be fined not more than two hundred dollars, and the carrier knowingly carrying or transporting

§ 903. ¹ 35 Stat. L. 1137.

³ United States v. Smith, 115 Fed.

² Rupert v. United States, 181

423.

Fed. 87, 104 C. C. A. 255 (8th Cir.).

⁴ Rupert v. United States, *supra*.

§ 904. ¹ 35 Stat. L. 1137.

the same in violation of said sections shall be fined not more than two hundred dollars.¹

§ 906. Criminal Code. Sec. 245. Importation and Transportation of Obscene, etc., Books, etc.

Whoever shall bring or cause to be brought into the United States or any place subject to the jurisdiction thereof, from any foreign country, or shall therein knowingly deposit or cause to be deposited with any express company or other common carrier, for carriage from one State, Territory, or District of the United States, or place non-contiguous to but subject to the jurisdiction thereof, to any other State, Territory, or District of the United States, or place non-contiguous to but subject to the jurisdiction thereof, or from any place in or subject to the jurisdiction of the United States through a foreign country, to any place in or subject to the jurisdiction thereof, or from any place in or subject to the jurisdiction of the United States to a foreign country, any obscene, lewd, or lascivious, or any filthy book, pamphlet, picture, paper, letter, writing, print, or other matter of indecent character, or any drug, medicine, article, or thing designed, adapted, or intended for preventing conception, or producing abortion, or for any indecent or immoral use, or any written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind, giving information, directly or indirectly, where, how, or of whom, or by what means any of the hereinbefore mentioned articles, matters, or things may be obtained or made; or whoever shall knowingly take or cause to be taken from such express company or other common carrier any matter or thing the depositing of which for carriage is herein made unlawful, shall be fined not more than five thousand dollars, or imprisoned not more than five years, or both.¹

The section is not unconstitutional as an abridgment of the freedom of the press.² An indictment is not duplicitous because it charged the deposit of several copies of an alleged lewd, obscene, lascivious, indecent, and filthy book in an express office for inter-

§ 905. ¹ 35 Stat. L. 1138.

§ 906. ¹ 35 Stat. L. 1138.

² Clark v. United States, 211 Fed. 916, 128 C. C. A. 294 (8th Cir.).

state transportation to different people.³ Where the charge was not limited to particular passages of the book, the defendants are entitled to have the whole book introduced in evidence and considered by the jury under proper instructions from the Court.⁴ The character of the transaction as commerce is not affected by the fact that the book is billed to a person of fictitious name supplied to the seller by the buyer.⁵

³ *Clark v. United States*, 211 Fed. Fed. 584, 142 C. C. A. 216 (7th Cir.).
916, 128 C. C. A. 294 (8th Cir.). See, *also* notes under §§ 872 and 873,

⁴ *Ibid.* *supra*.

⁵ *Hanish v. United States*, 227

CHAPTER LV

CRIMINAL CODE, CHAPTER TEN

THE SLAVE TRADE AND PEONAGE

- § 907. Crim. Code § 246. Confining or Detaining Slaves on Board Vessel.
- § 908. Crim. Code § 247. Seizing Slaves on Foreign Shores.
- § 909. Crim. Code § 248. Bringing Slaves into the United States.
- § 910. Crim. Code § 249. Equipping Vessels for Slave Trade.
- § 911. Crim. Code § 250. Transporting Persons to Be Held as Slaves.
- § 912. Crim. Code § 251. Hovering on Coast with Slaves on Board.
- § 913. Crim. Code § 252. Serving in Vessels Engaged in the Slave Trade.
- § 914. Crim. Code § 253. Receiving or Carrying Away Any Person to Be Sold or Held as a Slave.
- § 915. Crim. Code § 254. Equipping, etc., Vessel for Slave Trade.
- § 916. Crim. Code § 255. Penalty on Persons Building, Equipping, etc.
- § 917. Crim. Code § 256. Forfeiture of Vessel Transporting Slaves.
- § 918. Crim. Code § 257. Receiving Persons on Board to Be Sold as Slaves.
- § 919. Crim. Code § 258. Vessels Found Hovering on Coast.
- § 920. Crim. Code § 259. Forfeiture of Interest in Vessels Transporting Slaves.
- § 921. Crim. Code § 260. Seizure of Vessels Engaged in the Slave Trade.
- § 922. Crim. Code § 261. Proceeds of Condemned Vessels, How Distributed.
- § 923. Crim. Code § 262. Disposal of Persons Found on Board Seized Vessel.
- § 924. Crim. Code § 263. Apprehension of Officers and Crew.
- § 925. Crim. Code § 264. Removal of Persons Delivered from Seized Vessels.
- § 926. Crim. Code § 265. To What Port Captured Vessel Sent.
- § 927. Crim. Code § 266. When Owners of Foreign Vessels Shall Give Bond.
- § 928. Crim. Code § 267. Instructions to Commanders of Armed Vessels.
- § 929. Crim. Code § 268. Kidnapping.
- § 930. Crim. Code § 269. Holding or Returning Persons to Peonage.
- § 931. Crim. Code § 270. Obstructing Enforcement of Preceding Section.
- § 932. Crim. Code § 271. Bringing Kidnapped Persons into United States.

§ 907. Criminal Code. Sec. 246. Confining or Detaining Slaves on Board Vessel.

Whoever, being of the crew or ship's company of any foreign vessel engaged in the slave trade, or being of the

crew or ship's company of any vessel owned wholly or in part or navigated for or in behalf of any citizen of the United States, forcibly confines or detains on board such vessel any person as a slave, or, on board such vessel, offers or attempts to sell as a slave any such person, or on the high seas, or anywhere on tide water, transfers or delivers to any other vessel any such person with intent to make such person a slave, or lands or delivers on shore from on board such vessel any person with intent to make sale of, or having previously sold such person as a slave, is a pirate, and shall be imprisoned for life.¹

It is within the constitutional powers of Congress to prohibit foreign slave trade.² The intent to make a negro a slave is essential.³ Any conduct which puts one in fear or under moral restraint comes within the definition of "forcibly confined."⁴

§ 908. Criminal Code. Sec. 247. Seizing Slaves on Foreign Shores.

Whoever, being of the crew or ship's company of any foreign vessel engaged in the slave trade, or being of the crew or ship's company of any vessel owned in whole or in part, or navigated for, or in behalf of, any citizen of the United States, lands from such vessel, and, on any foreign shore, seizes any person with intent to make such person a slave, or decoys, or forcibly brings, or carries or receives such person on board such vessel, with like intent, is a pirate, and shall be imprisoned for life.¹

There are four descriptions of the offense to be found in this section: (1) Landing and seizing negroes; (2) forcibly bringing and carrying them on board; (3) decoying them; (4) receiving them on board of the vessel.² The intent to make a person a slave, regardless of all other acts, is the essence of the offense.³

§ 907. ¹ Formerly R. S. Sec. 5375, 35 Stat. L. 1138.

² *United States v. Gould*, 25 Fed. Cas. No. 15239.

³ *United States v. Libby*, 26 Fed. Cas. No. 15597.

⁴ *United States v. Westervelt*, 28 Fed. Cas. No. 16668.

§ 908. ¹ Formerly R. S. Sec. 5376, 35 Stat. L. 1139.

² *United States v. Westervelt*, 5 Blatch. 30, 28 Fed. Cas. No. 16668.

³ *United States v. Battiste*, 2 Summ. 240, 24 Fed. Cas. No. 14545; *United States v. Corrie*, 25 Fed. Cas. No. 14869.

§ 909. Criminal Code. Sec. 248. Bringing Slaves into the United States.

Whoever brings within the jurisdiction of the United States, in any manner whatsoever, any person from any foreign kingdom or country, or from sea, or holds, sells, or otherwise disposes of, any person so brought in, as a slave, or to be held to service or labor, shall be fined not more than ten thousand dollars, one half to the use of the United States and the other half to the use of the party who prosecutes the indictment to effect; and, moreover, shall be imprisoned not more than seven years.¹

The objects of the section from which this one is derived were to end the slave trade in the United States and to prevent the importation of slaves.²

§ 910. Criminal Code. Sec. 249. Equipping Vessels for Slave Trade.

Whoever builds, fits out, equips, loads, or otherwise prepares, or sends away, either as master, factor, or owner, any vessel, in any port or place within the jurisdiction of the United States, or causes such vessel to sail from any port or place whatsoever, within such jurisdiction, for the purpose of procuring any person from any foreign kingdom or country to be transported to any port or place whatsoever, to be held, sold, or otherwise disposed of as a slave, or held to service or labor, shall be fined not more than five thousand dollars, one half to the use of the United States and the other half to the use of the person prosecuting the indictment to effect; and shall, moreover, be imprisoned not more than seven years.¹

To constitute an offense under this section, the vessel must leave the port.²

§ 911. Criminal Code. Sec. 250. Transporting Persons to Be Held as Slaves.

Whoever, within the jurisdiction of the United States, takes on board, receives, or transports from any foreign

§ 909. ¹ Formerly R. S. Sec. 5377, 35 Stat. L. 1139.

² United States *v.* The Ship *Garonne*, 11 Pet. (U. S.) 73, 9 L. ed. 637.

§ 910. ¹ Formerly R. S. Sec. 5378, 35 Stat. L. 1139.

² United States *v.* LaCoste, 2 Mason, 129, 26 Fed. Cas. No. 15548.

kingdom or country, or from sea, any person in any vessel, for the purpose of holding, selling, or otherwise disposing of such person as a slave, or to be held to service or labor, shall be punished as prescribed in the section last preceding.¹

§ 912. Criminal Code. Sec. 251. Hovering on Coast with Slaves on Board.

Whoever, being the captain, master, or commander of any vessel found in any river, port, bay, harbor, or on the high seas, within the jurisdiction of the United States, or hovering on the coast thereof, having on board any person, for the purpose of selling such person as a slave, or with intent to land such person for any such purpose, shall be fined not more than ten thousand dollars and imprisoned not more than four years.¹

§ 913. Criminal Code. Sec. 252. Serving in Vessels Engaged in the Slave Trade.

Whoever, being a citizen of the United States, or other person residing therein, voluntarily serves on board of any vessel employed or made use of in the transportation of slaves from any foreign country or place to another, shall be fined not more than two thousand dollars and imprisoned not more than two years.¹

§ 914. Criminal Code. Sec. 253. Receiving or Carrying Away Any Person to Be Sold or Held as a Slave.

Whoever, being the master or owner or person having charge of any vessel, receives on board any other person, with the knowledge or intent that such person is to be carried from any place subject to the jurisdiction of the United States to any other place, to be held or sold as a slave, or carries away from any place subject to the jurisdiction of the United States any such person, with the intent that he may be so held or sold as a slave, shall be fined not more than five thousand dollars, or imprisoned not more than five years, or both.¹

§ 911. ¹ Formerly R. S. Sec. 5379,
35 Stat. L. 1139.

§ 912. ¹ Formerly R. S. Sec. 5380,
35 Stat. L. 1139.

§ 913. ¹ Formerly R. S. Sec. 5381,
35 Stat. L. 1139.

§ 914. ¹ Formerly R. S. Sec. 5524,
35 Stat. L. 1139.

§ 915. Criminal Code. Sec. 254. Equipping, etc., Vessel for Slave Trade.

No person shall, for himself or for another, as master, factor, or owner, build, fit, equip, load, or otherwise prepare any vessel in any port or place within the jurisdiction of the United States, or cause any vessel to sail from any port or place within the jurisdiction of the United States for the purpose of procuring any person from any foreign kingdom, place, or country to be transported to any port or place whatsoever, to be held, sold, or otherwise disposed of, as a slave, or to be held to service or labor; and every vessel so built, fitted out, equipped, laden, or otherwise prepared, with her tackle, apparel, furniture, and lading, shall be forfeited; one moiety to the use of the United States and the other to the use of the person who sues for the forfeiture and prosecutes the same to effect.¹

§ 916. Criminal Code. Sec. 255. Penalty on Persons Building, Equipping, etc.

Whoever so builds, fits out, equips, loads, or otherwise prepares or sends away any vessel, knowing or intending that the same shall be employed in such trade or business, contrary to the provisions of the section last preceding, or in any way aids or abets therein, shall, besides the forfeiture of the vessel, pay the sum of two thousand dollars; one moiety thereof to the use of the United States, and the other moiety thereof to the use of the person who sues for and prosecutes the same to effect.¹

§ 917. Criminal Code. Sec. 256. Forfeiture of Vessel Transporting Slaves.

Every vessel employed in carrying on the slave trade or on which is received or transported any person from any foreign kingdom or country, or from sea, for the purpose of holding, selling, or otherwise disposing of such person as a slave, or of holding such person to service or labor, shall, together with her tackle, apparel, furniture, and the goods and effects which may be found on board, or which may have been imported thereon in the same voyage, be for-

§ 915. ¹ Formerly R. S. Sec. 5551,
35 Stat. L. 1140.

§ 916. ¹ Formerly R. S. Sec. 5552,
35 Stat. L. 1140.

feited; one moiety to the use of the United States and the other to the use of the person who sues for and prosecutes the forfeiture to effect.¹

§ 918. Criminal Code. Sec. 257. Receiving Persons on Board to Be Sold as Slaves.

Whoever, being a citizen of the United States, takes on board, receives, or transports any person for the purpose of selling such person as a slave shall, in addition to the forfeiture of the vessel, pay for each person so received on board or transported the sum of two hundred dollars, to be recovered in any court of the United States; the one moiety thereof to the use of the United States, and the other moiety to the use of the person who sues for and prosecutes the same to effect.¹

§ 919. Criminal Code. Sec. 258. Vessels Found Hovering on Coast.

Every vessel which is found in any river, port, bay, or harbor, or on the high seas, within the jurisdiction of the United States, or hovering on the coasts thereof, and having on board any person, with intent to sell such person as a slave, or with intent to land the same for that purpose, either in the United States or elsewhere, shall, together with her tackle, apparel, furniture, and the goods or effects on board of her, be forfeited to the United States.¹

§ 920. Criminal Code. Sec. 259. Forfeiture of Interest in Vessels Transporting Slaves.

It shall be unlawful for any citizen of the United States, or other person residing therein, or under the jurisdiction thereof, directly or indirectly to hold or have any right or property in any vessel employed or made use of in the transportation or carrying of slaves from one foreign country or place to another, and any such right or property shall be forfeited, and may be libeled and condemned for the use of the person suing for the same. Whoever shall violate the

§ 917. ¹ Formerly R. S. Sec. 5553,
35 Stat. L. 1140.

§ 918. ¹ Formerly R. S. Sec. 5554,
35 Stat. L. 1140.

§ 919. Formerly R. S. Sec. 5555,
35 Stat. L. 1140.

prohibition of this section shall also forfeit and pay a sum of money equal to double the value of his right or property in such vessel; and shall also forfeit a sum of money equal to double the value of the interest he had in the slaves which at any time may be transported or carried in such vessels.¹

§ 921. Criminal Code. Sec. 260. Seizure of Vessels Engaged in the Slave Trade.

The President is authorized, when he deems it expedient, to man and employ any of the armed vessels of the United States to cruise wherever he may judge attempts are making to carry on the slave trade, by citizens or residents of the United States, in contravention of laws prohibitory of the same; and, in such case, he shall instruct the commanders of such armed vessels to seize, take, and bring into any port of the United States, to be proceeded against according to law, all American vessels, wheresoever found, which may have on board, or which may be intended for the purpose of taking on board, or of transporting, or may have transported any person, in violation of the provisions of any Act of Congress prohibiting the traffic in slaves.¹

§ 922. Criminal Code. Sec. 261. Proceeds of Condemned Vessels, How Distributed.

The proceeds of all vessels, their tackle, apparel, and furniture, and the goods and effects on board of them, which are so seized, prosecuted, and condemned, shall be paid into the Treasury of the United States.¹

§ 923. Criminal Code. Sec. 262. Disposal of Persons Found on Board Seized Vessel.

The officers of the vessel making such seizure shall safely keep every person found on board of any vessel so seized, taken, or brought into port for condemnation and shall deliver every such person to the marshal of the district into which he may be brought, if into a port of the United States, or if elsewhere, to such person as may be lawfully

§ 920. ¹ Formerly R. S. Sec. 5556,
35 Stat. L. 1140.

§ 922. ¹ Formerly R. S. Sec. 5558,
35 Stat. L. 1141.

§ 921. ¹ Formerly R. S. Sec. 5557,
35 Stat. L. 1140.

appointed by the President, in the manner directed by law, transmitting to the President, as soon as may be after such delivery, a descriptive list of such persons, in order that he may give directions for the disposal of them.¹

§ 924. Criminal Code. Sec. 263. Apprehension of Officers and Crew.

The commanders of such commissioned vessels shall cause to be apprehended and taken into custody every person found on board of such offending vessel so seized and taken, being of the officers or crew thereof, and him convey, as soon as conveniently may be, to the civil authority of the United States, to be proceeded against in due course of law.¹

§ 925. Criminal Code. Sec. 264. Removal of Persons Delivered from Seized Vessels.

The President is authorized to make such regulations and arrangements as he may deem expedient for the safe-keeping, support, and removal beyond the limits of the United States of all such persons as may be so delivered and brought within its jurisdiction.¹

§ 926. Criminal Code. Sec. 265. To What Port Captured Vessels Sent.

It shall be the duty of the commander of any armed vessel of the United States, whenever he makes any capture under the preceding provisions, to bring the vessel and her cargo, for adjudication, into some port of the State, Territory, or District to which such vessel so captured may belong, if he can ascertain the same; if not, then into any convenient port of the United States.¹

§ 927. Criminal Code. Sec. 266. When Owners of Foreign Vessels Shall Give Bond.

Every owner, master, or factor of any foreign vessel clearing from any port within the jurisdiction of the United States, and suspected to be intended for the slave trade,

§ 923. ¹ Formerly R. S. Sec. 5559,
35 Stat. L. 1141.

§ 924. ¹ Formerly R. S. Sec. 5560,
35 Stat. L. 1141.

§ 925. ¹ Formerly R. S. Sec. 5561,
35 Stat. L. 1141.

§ 926. ¹ Formerly R. S. Sec. 5563,
35 Stat. L. 1141.

and the suspicion being declared to the officer of the customs by any citizen, on oath, and such information being to the satisfaction of the officer, shall first give bond, with sufficient sureties, to the Treasurer of the United States that none of the natives of any foreign country or place shall be taken on board such vessel to be transported or sold as slaves in any other foreign port or place whatever, within nine months thereafter.¹

§ 928. Criminal Code. Sec. 267. Instructions to Commanders of Armed Vessels.

The President is authorized to issue instructions to the commanders of the armed vessels of the United States, directing them, whenever it is practicable, and under such rules and regulations as he may prescribe, to proceed directly to the country from which they were taken, and there hand over to the agent of the United States all such persons, delivered from on board vessels seized in the prosecution of the slave trade; and they shall afterwards bring the captured vessels and persons engaged in prosecuting such trade to the United States for trial and adjudication.¹

§ 929. Criminal Code. Sec. 268. Kidnapping.

Whoever kidnaps or carries away any other person, with the intent that such other person be sold into involuntary servitude, or held as a slave; or who entices, persuades, or induces any other person to go on board any vessel or to any other place with the intent that he may be made or held as a slave, or sent out of the country to be so made or held; or who in any way knowingly aids in causing any other person to be held, sold, or carried away to be held or sold as a slave, shall be fined not more than five thousand dollars, or imprisoned not more than five years, or both.¹

Originally this section was Section 5525 R. S. and its purpose was to prevent the sale of slaves to Cuba and other slaveholding countries.² Any person who falsely accuses another of crime

§ 927. ¹ Formerly R. S. Sec. 5564,
35 Stat. L. 1141.

§ 928. ¹ Formerly R. S. Sec. 5567,
35 Stat. L. 1141.

§ 929. ¹ Formerly R. S. Sec. 5525,
35 Stat. L. 1141.

² United States v. McClellan, 127
Fed. 971, 977.

and carries him before a magistrate in order that he may be convicted and put to hard labor, in consequence of which such person is convicted and put to hard labor, the false accuser at the time having the purpose or design to hire such person, or to enable some other person to hire him, commits an offense under this section.³ The jurisdiction of the State and Federal Courts to punish for the crime of kidnapping is concurrent.⁴ But in a recent case where a number of supposed I. W. W. members were forcibly and without due process of law taken from their homes in Arizona, put in box cars and transported under guard to the desert of New Mexico, where they were released by their captors, it was held that no Federal offense under this and the two succeeding sections was committed, and that the offense was punishable only by the laws of the State of Arizona.⁵

§ 930. Criminal Code. Sec. 269. Holding or Returning Persons to Peonage.

Whoever holds, arrests, returns, or causes to be held, arrested, or returned, or in any manner aids in the arrest or return of any person to a condition of peonage, shall be fined not more than five thousand dollars, or imprisoned not more than five years, or both.¹

The constitutionality of this and similar statutes has been upheld.² Peonage has been defined as a condition of compulsory service based upon indebtedness of the peon to the master.³ Before a conviction under this statute may be had it must appear that the person held or arrested was prior to such time a peon.⁴

³ Peonage Cases, 123 Fed. 671, 682.

⁴ United States v. McClellan, 127 Fed. 971, 977.

⁵ United States v. Wheeler, 254 Fed. 611. See also notes under Sec. 680 in this volume.

§ 930. ¹ Formerly R. S. Sec. 5526, 35 Stat. L. 1142.

² Clyatt v. United States, 197 U. S. 207, 49 L. ed. 726, 25 S. C. 429; United States v. McClellan, 127 Fed. 971; In re Lewis, 114 Fed. 963.

³ Clyatt v. United States, 197 U. S. 207, 49 L. ed. 726, 25 S. C. 429;

Bailey v. Alabama, 219 U. S. 219, 55 L. ed. 191, 31 S. C. 145; United States v. Reynolds, 235 U. S. 133, 59 L. ed. 162, 35 S. C. 86; In re Peonage Charge, 138 Fed. 686; Taylor v. United States, 244 Fed. 321, 156 C. C. A. 607 (4th Cir.); Peonage Cases, 136 Fed. 707; Peonage Cases, 123 Fed. 671.

⁴ Taylor v. United States, 244 Fed. 321, 156 C. C. A. 607 (4th Cir.); Clyatt v. United States, 197 U. S. 207, 49 L. ed. 726, 25 S. C. 429; United States v. Eberhart, 127 Fed. 252.

Physical force is not a necessary element of the crime. The crime is complete when by threats of prosecution the condition of peonage is established, and it is of no consequence whether the indebtedness claimed was an honest indebtedness or otherwise.⁵ The statute nowhere makes it an element or constituent of the offense of "holding to a condition of peonage" that the condition shall exist or be created under any law or custom upholding a system of peonage.⁶ The Penal Code of Alabama which gave rise to a system of peonage is contrary to the doctrine of the United States Statutes and is in direct conflict with the Thirteenth Amendment to the Constitution.⁷ The Federal statute does more than to merely abolish an existing system. It makes criminal certain acts which would tend to sustain or reestablish such a system.⁸

§ 931. Criminal Code. Sec. 270. Obstructing Enforcement of Preceding Section.

Whoever obstructs, or attempts to obstruct, or in any way interferes with or prevents the enforcement of the section last preceding, shall be liable to the penalties therein prescribed.¹

§ 932. Criminal Code. Sec. 271. Bringing Kidnapped Persons into United States.

Whoever shall knowingly and willfully bring into the United States or any place subject to the jurisdiction thereof, any person inveigled or forcibly kidnapped in any other country, with intent to hold such person so inveigled or kidnapped in confinement or to any involuntary servitude; or whoever shall knowingly and willfully sell, or cause to be sold, into any condition of involuntary servitude, any other person for any term whatever; or whoever shall knowingly and willfully hold to involuntary servitude any person so brought or sold, shall be fined not more than five thousand dollars and imprisoned not more than five years.¹

⁵ United States v. Clement, 171 Fed. 974.

⁶ Peonage Cases, 123 Fed. 671, 676; United States v. Eberhart, 127 Fed. 252.

⁷ United States v. Reynolds, 235 U. S. 133, 59 L. ed. 162, 35 S. C. 86;

Bailey v. Alabama, 219 U. S. 219, 55 L. ed. 191, 31 S. C. 145.

⁸ In re Lewis, 114 Fed. 963.

§ 931. ¹ Formerly R. S. Sec. 5527, 35 Stat. L. 1142.

§ 932. ¹ 35 Stat. 1142.

CHAPTER LVI

CRIMINAL CODE, CHAPTER ELEVEN

OFFENSES WITHIN THE ADMIRALTY AND MARITIME AND THE TERRITORIAL JURISDICTION OF THE UNITED STATES

- § 933. Crim. Code § 272. Places within or Waters upon Which Sections of This Chapter Shall Apply.
- § 934. Crim. Code § 273. Murder.
- § 935. Crim. Code § 274. Manslaughter.
- § 936. Crim. Code § 275. Punishment for Murder; for Manslaughter.
- § 937. Crim. Code § 276. Assault with Intent to Commit Murder, Rape, Robbery, etc.
- § 938. Crim. Code § 277. Attempt to Commit Murder or Manslaughter.
- § 939. Crim. Code § 278. Rape.
- § 940. Crim. Code § 279. Having Carnal Knowledge of Female under Sixteen.
- § 941. Crim. Code § 280. Seduction of Female Passenger on Vessel.
- § 942. Crim. Code § 281. Payment of Fine to Female Seduced; Evidence Required; Limitation on Indictment.
- § 943. Crim. Code § 282. Loss of Life by Misconduct of Officers, etc., of Vessel.
- § 944. Crim. Code § 283. Maiming.
- § 945. Crim. Code § 284. Robbery.
- § 946. Crim. Code § 285. Arson of Dwelling House.
- § 947. Crim. Code § 286. Arson of Other Buildings, etc.
- § 948. Crim. Code § 287. Larceny.
- § 949. Crim. Code § 288. Receiving, etc., Stolen Goods.
- § 950. Crim. Code § 289. Laws of States Adopted for Punishing Wrongful Acts, etc.

§ 933. Criminal Code. Sec. 272. Places within or Waters upon Which Section of This Chapter Shall Apply.

The crimes and offenses defined in this chapter shall be punished as herein prescribed :

First. When committed upon the high seas, or on any other waters within the admiralty and maritime jurisdiction

of the United States and out of the jurisdiction of any particular State, or when committed within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State on board any vessel belonging in whole or in part to the United States or any citizen thereof, or to any corporation created by or under the laws of the United States, or of any State, Territory, or District thereof.

Second. When committed upon any vessel registered, licensed, or enrolled under the laws of the United States, and being on a voyage upon the waters of any of the Great Lakes, namely: Lake Superior, Lake Michigan, Lake Huron, Lake Saint Clair, Lake Erie, Lake Ontario, or any of the waters connecting any of said lakes, or upon the River Saint Lawrence where the same constitutes the International boundary line.

Third. When committed within or on any lands reserved or acquired for the exclusive use of the United States, and under the exclusive jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building.

Fourth. On any island, rock, or key, containing deposits of guano, which may, at the discretion of the President, be considered as appertaining to the United States.¹

An indictment is sufficient which describes the tract of land on which the crime was committed by metes and bounds.² This chapter deals with offenses federal in their nature, wherever committed, except, where by special enactment, it is provided otherwise;³ but it does not extend the jurisdiction to include the District of Columbia.⁴ Taking fish with felonious intent from a pound situated beyond the three mile limit in the Atlantic Ocean is punishable in the Federal Courts.⁵ This section confers exclusive jurisdiction upon the Federal Courts of crimes

§ 933. ¹ 35 Stat. L. 1142.

² *Brown v. United States*, 257 Fed. 46, — C. C. A. — (5th Cir.).

³ *Johnson v. United States*, 225 U.S. 405, 416, 56 L. ed. 1142, 32 S. C. 748.

⁴ *Johnson v. United States*, 225 U. S. 405, 414, 416, 56 L. ed. 1142, 32 S. C. 748.

⁵ *Miller v. United States*, 242 Fed. 907, 155 C. C. A. 495 (3d Cir.).

committed on an Indian Reservation.⁶ The locality of the offense is the basis of the jurisdiction of the Federal Court.⁷ The land upon which the act was committed must be reserved for the exclusive use of the United States, and merely holding it in trust for the use of an Indian is not sufficient.⁸ The territorial jurisdiction of the United States does not depend upon the size of the particular areas which are held for Federal purposes.⁹ The United States Courts have jurisdiction over crimes committed by one Indian upon another on an Indian Reservation.¹⁰

§ 934. Criminal Code. Sec. 273. Murder.

Murder is the unlawful killing of a human being with malice aforethought. Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, rape, burglary, or robbery; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed, is murder in the first degree. Any other murder is murder in the second degree.¹

Where the acts constituting an assault are alleged to have been done with malice aforethought, it is not necessary to make such allegations in the preliminary averment.² An indictment charging that A. B. & C. acting jointly, killed and murdered D. is sufficient to authorize the conviction of one of them, although the others may be acquitted.³ An indictment charging the homicide to have been caused by shooting and drowning is not demurrable for duplicity or uncertainty.⁴ A homicide committed by a

⁶ *Ex parte Van Moore*, 221 Fed. 954.

⁷ *Atlantic Transport Co. of West Virginia v. Imbrovek*, 234 U. S. 52, 58 L. ed. 1208, 34 S. C. 733.

⁸ *United States v. Lewis*, 253 Fed. 469.

⁹ *United States v. Pelican*, 232 U. S. 442, 450, 58 L. ed. 676, 34 S. C. 396.

¹⁰ *Ibid.*

§ 934. ¹ Formerly R. S. Sec. 5339,

35 Stat. L. 1143. See also comments and notes under the next section defining manslaughter.

² *Holt v. United States*, 218 U. S. 245, 54 L. ed. 1021, 31 S. C. 2.

³ *St. Clair v. United States*, 154 U. S. 134, 38 L. ed. 936, 14 S. C. 1002.

⁴ *Andersen v. United States*, 170 U. S. 481, 42 L. ed. 1116, 18 S. C. 689.

United States Deputy Marshal, in performance of his duty in protecting the life and person of a United States Supreme Court Justice, is an "act done in pursuance of a law of the United States" and cannot, therefore, be an offense against the State law. Petitioner held by State authorities is dischargeable on *habeas corpus* to United States Circuit Court.⁵ An indictment under this section need not charge that the crime was done feloniously.⁶ An indictment for murder, which fails to set forth the time and the place of the death, is fatally defective.⁷ An indictment for conspiracy resulting in the killing of a United States Deputy Marshal is not bad for duplicity, as charging defendant with the conspiracy and murder. The defendant having been acquitted of the charge of murder may still be punished for the conspiracy, if proved.⁸ Where an indictment for murder in the Chickasaw Nation, Indian Tribe, avers that both deceased and accused were white men, proof that the deceased was a white man lays the jurisdiction, and the averment as to citizenship of the accused is surplusage.⁹ An indictment for murder as an accessory before the fact was quashed, because there was then no act of Congress prescribing punishment for such an offense.¹⁰ In an indictment for murder committed on board a vessel on the high seas, by an alien, it is sufficient to allege that the vessel was owned by a citizen of the United States, without alleging the national character of the vessel.¹¹ The United States has exclusive jurisdiction over land ceded by a State, even though the terms of the cession provide that the State shall retain concurrent jurisdiction for the execution of civil or criminal processes by State officers.¹² A vessel's certificate of registry and proof that she carried the United States flag are properly admitted on the trial and establish a *prima facie* case of proper registry and nationality of the vessel and its owner.¹³

⁵ *In re Neagle*, 39 Fed. 833.

⁶ *Myres v. United States*, 256 Fed. 779 (C. C. A. 5th Cir.).

⁷ *Ball v. United States*, 140 U. S. 118, 35 L. ed. 377, 11 S. C. 761.

⁸ *United States v. Davis*, 103 Fed. 457.

⁹ *Stevenson v. United States* 86, Fed. 106, 29 C. C. A. 600 (5th Cir.).

¹⁰ *United States v. Ramsay, Hempstead*, 481, Fed. Cas. No. 16115; for the present law see § 992, *supra*.

¹¹ *United States v. Demarchi*, 5 Blatch. 84, Fed. Cas. No. 14944.

¹² *United States v. Meagher*, 37 Fed. 875.

¹³ *St. Clair v. United States*, 154 U. S. 134, 38 L. ed. 936, 14 S. C. 1002.

Since this section is not procedural, and since, by Act of Congress, Alaska had adopted the laws of the State of Oregon, where not in conflict with those of the United States, the Oregon rules of procedure take precedence over the rules of the Common Law, in Alaska.¹⁴ A person indicted for murder but convicted of an included crime, by procuring that conviction to be set aside, waives the right to set up a plea of former jeopardy and may be tried again for murder.¹⁵ The common law distinction between misdemeanors and felonies has no application to persons in military service. Prior acquittal by a Military Court of Inquiry is a bar to a civil prosecution, and the prisoner is put in "double jeopardy" thereby.¹⁶ The Government bears the burden of proving that the crime was committed on land under the exclusive jurisdiction of the United States.¹⁷ Intoxication or delirium from use of drugs with knowledge that it is likely to produce such effect, is no excuse for crime. But where defendant takes an overdose of chloral though believing that such overdose would produce unconsciousness, he nevertheless is not legally responsible for acts committed in an insane frenzy actually induced by such overdose.¹⁸ Intoxication is no excuse for crime. It must be considered, however, as bearing upon the mental condition of the defendant, in determining his capacity of entertaining a specific intent.¹⁹ The willful killing of a soldier by a sergeant of the guard while on duty is not necessarily a justifiable homicide. A soldier is obliged to obey only the lawful orders of his superior officers.²⁰ To support the plea of justifiable homicide, defendant must have retreated as far as he could have done with safety to himself. There must have been apparent imminent danger of death or grievous bodily harm to himself, or to his friend for whose protection he was acting; and defendant's belief as to such danger must have been honest, and reasonable

¹⁴ *United States v. Clark*, 46 Fed. 633; but see present code of Alaska.

¹⁵ *United States v. Gonzales*, 206 Fed. 239, but see § 235, Vol. I.

¹⁶ *Crafton v. United States*, 206 U. S. 333, 51 L. ed. 1064, 27 S. C. 749.

¹⁷ *United States v. Meagher*, 37 Fed. 875.

¹⁸ *Perkins v. United States*, 228 Fed. 408, 142 C. C. A. 638 (4th Cir.).

¹⁹ *United States v. Meagher*, 37 Fed. 875.

²⁰ *United States v. Carr*, 1 Woods, 480, Fed. Cas. No. 14732.

under the circumstances.²¹ Self-defense justifies a homicide. But the killing, to be so justifiable, must be done in the face of imminent danger, such as must be instantly met, and which cannot be guarded against by calling on others for protection.²² Threats, words or gestures, will not of themselves justify a killing. There must be an actual attempt at execution, putting defendant in imminent danger.²³ The setting of a spring gun in open fields or outhouse, not within the privilege of the domicile, without notice, will not justify an ensuing homicide.²⁴ Homicide in resisting an arrest which is substantially illegal will amount to manslaughter at the most.²⁵ If an officer lawfully engaged in executing a process is resisted by the person to be arrested in such a manner as to be compelled to take the life of such person in self-defense, such killing is justified by the process.²⁶ If a sane person becomes voluntarily intoxicated, and, while intoxicated commits murder because of insanity consequent upon such intoxication, he is responsible.²⁷ A person suffering from delirium tremens, who is so far insane as not to know the nature of his act, is not punishable.²⁸ Insanity *per se* does not exempt one from punishment for murder. If the accused understood the nature of his act, knew it was wrong and deserved punishment, he is responsible.²⁹ Insanity caused by drunkenness, where the party is not intoxicated at the time of the commission of the act charged, excuses as much as any other form of involuntarily contracted insanity.³⁰ In order to justify a homicide, the person assaulted must have retreated, as far as possible, before slaying the assailant.³¹ The elements of the crime are to be

²¹ United States *v.* King, 34 Fed. 302; Allen *v.* United States, 164 U. S. 492, 41 L. ed. 528, 17 S. C. 154.

²² United States *v.* Outerbridge, 5 Sawyer, 620, Fed. Cas. No. 15978.

²³ United States *v.* Outerbridge, *supra*; United States *v.* Carr, 1 Woods, 480, Fed. Cas. No. 14732.

²⁴ United States *v.* Gilliam, 1 Hayw. & H. 109, Fed. Cas. No. 15-205 *a.*

²⁵ United States *v.* Travers, 1 Brun. Col. Cas. 467, Fed. Cas. No. 16537.

²⁶ United States *ex rel.* Roberts *v.* Jailer, Fed. Cas. No. 15463.

²⁷ United States *v.* McGlue, 1 Curt. 1, Fed. Cas. No. 15679; United States *v.* Drew, 5 Mason, 28, Fed. Cas. No. 14993.

²⁸ United States *v.* McGlue, *supra*.

²⁹ *Ibid.*

³⁰ United States *v.* Woodward, 2 Hayw. & H. 119, Fed. Cas. No. 16760 *a.*

³¹ Allen *v.* United States, 164 U. S. 492, 41 L. ed. 528, 17 S. C. 154.

determined by the rules of the common law.³² If a seaman is in a state of great exhaustion, so that he cannot go aloft without danger of death, a master, who, knowing that fact, forces the seaman, by moral and physical force, to go aloft, is guilty of murder, when the seaman falls from the mast and is drowned thereby. If there is no malice in the master, the crime is reduced to manslaughter.³³ Malice in relation to murder is the conscious violation of law to the prejudice of another; evil design in general; the dictates of a wicked and malignant heart, *i.e.*, the malice need not be specific.³⁴ The intent necessary to constitute malice aforethought may spring up at the instant of killing and be inferred from the fact of killing.³⁵ If the alleged murderer, at the time of the commission of the act, was of sound mind, but was for the time in a state of passion which controlled his mind, it would reduce the crime to manslaughter, if there was adequate provocation. To constitute murder, the deliberate, wicked, malicious design must accompany the act at the instant of commission.³⁶ Murder may be defined as existing where a person of sound memory and discretion unlawfully and feloniously kills any human being, in the peace of the sovereign, with malice pre-pense or aforethought, express or implied.³⁷ Malice aforethought, the distinguishing element of murder, means an intention to do such bodily harm as may produce death, in the absence of mitigating circumstances; an intent of mind and heart, prompting the doing of the wrongful act, without cause.³⁸ The offense of manslaughter is necessarily included in the offense of murder. The other ingredients of murder being proved, the absence of malice makes the case one of manslaughter.³⁹ The difference between murder and manslaughter consists in the presence of malice, express or implied in the former, and the absence of malice

³² *United States v. Lewis*, 111 Fed. 630.

³³ *United States v. Freeman*, 4 Mason, 505, Fed. Cas. No. 15162.

³⁴ *United States v. Hart*, 162 Fed. 192.

³⁵ *Allen v. United States*, 164 U. S. 492, 41 L. ed. 528, 17 S. C. 154.

³⁶ *United States v. Woodward*, 2 Hayw. & H. 119, 28 Fed. Cas. No.

16760 a; *Roberts v. United States*, 126 Fed. 897, 61 C. C. A. 427 (5th Cir.).

³⁷ *United States v. Meagher*, 37 Fed. 875.

³⁸ *United States v. Boyd*, 45 Fed. 851.

³⁹ *United States v. Leonard*, 2 Fed. 669.

in the latter.⁴⁰ Malice is implied in every case of intentional homicide. The burden rests on the defendant to rebut that presumption.⁴¹ Malice is not presumed from the mere fact of killing, but the surrounding circumstances may be such as to constitute malice at law.⁴² The so-called "degrees" of murder are not distinguished by the laws of the United States. The Federal Courts must resort to the Common Law for the construction of the phrase "willful murder."⁴³ A "willful" killing is one which is intentional, and not accidental.⁴⁴ It is a question of law for the court, where a homicide was committed, within the boundaries of a State, whether there has been such a cession of the ground upon which the alleged crime was committed, by the State, to the United States, as to give the United States jurisdiction over the offense.⁴⁵ If a man shooting at one man, with intent to kill, hits and kills another, whether through recklessness or mistaken identity, he is guilty of the murder of such person.⁴⁶ If the killing was caused by the accidental, not negligent, unintentional firing of a pistol, by a person not engaged in an unlawful act, the act is a "homicide by misadventure", and is not a crime.⁴⁷ On an indictment for murder, twenty peremptory challenges are allowed.⁴⁸ Confessions are not rendered inadmissible by the fact that the parties are in custody, provided they are not extorted by inducement or threat.⁴⁹ Under an indictment charging A, B, and C, with the murder of D, without alleging that they were co-conspirators, evidence of the acts of B and C is admissible as against A, as part of the *res gestæ*.⁵⁰ It is not indispensable to a conviction for murder that the particular motive for the act be established by proof to the satisfaction

⁴⁰ *United States v. Outerbridge*, 5 Sawyer, 620, Fed. Cas. No. 15978.

⁴¹ *United States v. Outerbridge*, 5 Sawyer, 620, Fed. Cas. No. 15978.

⁴² *United States v. Armstrong*, 2 Curt. 446, Fed. Cas. No. 14467.

⁴³ *United States v. Outerbridge*, 5 Sawyer, 620, Fed. Cas. No. 15978; *United States v. Clark*, 46 Fed. 633, 635.

⁴⁴ *United States v. Boyd*, 45 Fed. 851.

⁴⁵ *United States v. Lewis*, 111 Fed. 630.

⁴⁶ *United States v. Hart*, 162 Fed. 192.

⁴⁷ *United States v. Meagher*, 37 Fed. 875.

⁴⁸ *United States v. Hewson*, Brun. Col. Cas. 532, Fed. Cas. No. 15360.

⁴⁹ *Pierce v. United States*, 160 U. S. 355, 40 L. ed. 454, 16 S. C. 321.

⁵⁰ *St. Clair v. United States*, 154 U. S. 134, 38 L. ed. 936, 14 S. C. 1002.

of the jury.⁵¹ In an indictment for murder, by throwing a child overboard, the burden is on the Government to show, where the defendant sets up that the child had died in a fit before it was thrown overboard, that this was not the case.⁵² Seamen are competent and credible witnesses.⁵³ Evidence of good character is admissible.⁵⁴ Circumstances in justification of a homicide must be proved by the accused.⁵⁵ Evidence that the defendant, three months prior to the homicide, declared an intention to kill "the next deputy marshal that arrested him", is not admissible as being too remote and general.⁵⁶ The sanity of the accused is presumed until the contrary is shown.⁵⁷ Defendant has a right to have a full statement of the law from the Court, and a neglect to give such full statement, when the jury consequently fall into error, is sufficient reason for reversal.⁵⁸ The Colville Reservation in the State of Washington is included in the Indian country, and a crime of murder committed in such reservation must be prosecuted in the Federal Court.⁵⁹

§ 935. Criminal Code. Sec. 274. Manslaughter.

Manslaughter is the unlawful killing of a human being without malice. It is of two kinds:

First. Voluntary — Upon a sudden quarrel or heat of passion.

Second. Involuntary — In the commission of an unlawful act not amounting to a felony, or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection.¹

⁵¹ *Pointer v. United States*, 151 U. S. 396, 38 L. ed. 208, 14 S. C. 410.

⁵² *United States v. Hewson*, Brun. Col. Cas. 532, Fed. Cas. No. 15360.

⁵³ *United States v. Freeman*, 4 Mason, 505, Fed. Cas. No. 15162.

⁵⁴ *United States v. Freeman*, 4 Mason, 505, Fed. Cas. No. 15162.

⁵⁵ *United States v. Travers*, Brun. Col. Cas. 467, Fed. Cas. No. 16537.

⁵⁶ *Stevenson v. United States*, 86 Fed. 106, 29 C. C. A. 600 (5th Cir.).

⁵⁷ *United States v. McGlue*, 1

Curt. 1, Fed. Cas. No. 15679; but see §§ 337, 338, *supra*.

⁵⁸ *Bird v. United States*, 180 U. S. 356, 45 L. ed. 570, 21 S. C. 403.

⁵⁹ *United States v. Pelican*, 232 U. S. 442, 58 L. ed. 676, 34 S. C. 396.

§ 935. ¹ Formerly R. S. Sec. 5341, 35 Stat. L. 1143. Consult also notes under § 934. Not applicable to District of Columbia. *Johnson v. United States*, 225 U. S. 405, 56 L. ed. 1142, 32 S. C. 748. The act of January 15, 1897, 29 Stat. 487 c. 29, and Criminal Code Sec. 330, § 991, *infra*,

How far and to what extent the accused will be excused or is excusable in law must depend upon the nature and character of the act he was committing and which produced the necessity that he defend himself. When his own original act was in violation of law, then the law takes that fact into consideration in limiting his right of defense and resistance whilst in the perpetration of such unlawful act. If he was engaged in the commission of a felony, and, to prevent its commission, the party seeing it or about to be injured thereby makes a violent assault upon him, calculated to produce death or serious bodily harm, and in resisting such attack he slays his assailant, the law would impute the original wrong to the homicide and make it murder; but if the original wrong was or would have been a misdemeanor, then the homicide growing out of or occasioned by it, would be manslaughter under the law.² If a man shoots at another with the intent of killing him (and such killing if consummated would be murder) and kills a bystander or another, he is guilty of the murder of the person killed, and this would be true whether the killing of the latter was due to a mistake as to his or her identity, or recklessness in the aim of the one doing the killing.³ A killing caused by the reckless disregard of human life as shown in the negligent use of dangerous instruments is a willful killing within the meaning of the statute.⁴ The wounding of one on an American ship in the harbor of a foreign country, the death taking place in that country, is not murder even though willfully done.⁵ The killing must be willful to constitute manslaughter. We have such a willful killing when it results from the negligent use of dangerous agencies, as fire-arms.⁶

permit the jury in a capital case of murder or rape to qualify the verdict by adding "without capital punishment."

² *Addington v. United States*, 165 U. S. 184, 41 L. ed. 679, 17 S. C. 288. *Accord*: *Allen v. United States*, 164 U. S. 492, 498, 41 L. ed. 528, 17 S. C. 154; *Wallace v. United States*, 162 U. S. 466, 40 L. ed. 1039, 16 S. C. 859; *Andersen v. United States*, 170 U. S. 481, 42 L. ed. 1116, 18 S. C. 689.

³ *United States v. Hart*, 162 Fed. 192.

⁴ *Roberts v. United States*, 126 Fed. 897, 61 C. C. A. 427 (5th Cir.); *Affirmed* 127 Fed. 818, 62 C. C. A. 134 (5th Cir.); *Certiorari denied* 193 U. S. 673, 48 L. ed. 842, 24 S. C. 855.

⁵ *United States v. Hewecker*, 79 Fed. 59.

⁶ *United States v. Meagher*, 37 Fed. 875; *Roberts v. United States*, 126 Fed. 897, 61 C. C. A. 427 (5th Cir.). *See United States v. Lipsett*, 156 Fed. 65.

Manslaughter includes a killing where a party, judging from appearances, makes an error of fact and is mistaken because he is negligent.⁷ The term "willfully" as used in the statute refers to killing done wrongfully and with evil intent; and a killing under circumstances showing a reckless disregard for the life of another, would be a willful killing, as defined.⁸ The commission of such offense of manslaughter was necessarily included in the offense of murder charged in the indictment, because the absence of malice, the other ingredients charged being proved, made the case one of manslaughter, when, with the malice added, it would have been murder.⁹ A homicide committed by a sergeant of the guard, without malice, and in the performance of his supposed duty as a soldier, is excusable, unless it was beyond the scope of his authority, or manifestly illegal.¹⁰ Alaska is not to be considered "Indian Country" within the meaning of the Intercourse Act of 1834 and the Revised Statutes, and therefore a crime committed by one native upon another native can be tried and punished in the District Court of Alaska.¹¹ The United States has jurisdiction over the crime of murder and manslaughter committed by an Indian on a white person and vice-versa provided it occurs in "Indian Country."¹² In criminal cases in the Federal Courts, medical testimony taken out of books is not admissible. When such testimony is admitted the defendant is not entitled to an instruction that the jury must believe it even though it was uncontradicted.¹³ There is no responsibility for a murder committed in a state of insanity produced by an overdose of drugs.¹⁴ A judge may be entirely satisfied from the whole evidence in the case that the person doing the killing was actuated by malice; that he was not in any such

⁷ *United States v. King*, 34 Fed. 302; *United States v. Meagher*, 37 Fed. 875; *United States v. Lewis*, 111 Fed. 630.

⁸ *Roberts v. United States*, 126 Fed. 897, 61 C. C. A. 427 (5th Cir.).

⁹ *United States v. Leonard*, 2 Fed. 669, 671.

¹⁰ *United States v. Clark*, 31 Fed. 710.

¹¹ *Kie v. United States*, 27 Fed. 351.

¹² *United States v. Barnhart*, 22 Fed. 285.

¹³ *United States v. Perkins*, 221 Fed. 109. *Reversed on other grounds* in 228 Fed. 408, 142 C. C. A. 638 (4th Cir.).

¹⁴ *Perkins v. United States*, 228 Fed. 408, 142 C. C. A. 638 (4th Cir.).

passion as to lower the grade of the crime from murder to manslaughter by reason of any absence of malice; and yet, if there be any evidence tending to bear upon the question tending to reduce the crime to the grade of manslaughter, it is the province of the jury to determine from all the evidence what the condition of the mind was, and to say whether the crime was murder or manslaughter.¹⁵

§ 936. Criminal Code. Sec. 275. Punishment for Murder; for Manslaughter.

Every person guilty of murder in the first degree shall suffer death. Every person guilty of murder in the second degree shall be imprisoned not less than ten years and may be imprisoned for life. Every person guilty of voluntary manslaughter shall be imprisoned not more than ten years. Every person guilty of involuntary manslaughter shall be imprisoned not more than three years, or fined not exceeding one thousand dollars, or both.¹

§ 937. Criminal Code. Sec. 276. Assault with Intent to Commit Murder, Rape, Robbery, etc.

Whoever shall assault another with intent to commit murder, or rape, shall be imprisoned not more than twenty years. Whoever shall assault another with intent to commit any felony, except murder, or rape, shall be fined not more than three thousand dollars, or imprisoned not more than ten years, or both. Whoever, with intent to do bodily harm, and without just cause or excuse, shall assault another with a dangerous weapon, instrument, or other thing, shall be fined not more than one thousand dollars, or imprisoned not more than five years, or both. Whoever shall unlawfully strike, beat, or wound another shall be fined not more than five hundred dollars, or imprisoned not more than six months, or both. Whoever shall unlawfully assault another shall be fined not more than three hundred dollars, or imprisoned not more than three months, or both.¹

¹⁵ *Stevenson v. United States*, 162 U. S. 313, 40 L. ed. 980, 16 S. C. 839; *United States v. Lewis*, 111 Fed. 630.

§ 936. ¹ Formerly R. S. Sec. 5339, 5343, 35 Stat. L. 1143.

§ 937. ¹ Formerly R. S. Sec. 5346, 35 Stat. L. 1143.

An indictment is not too uncertain because it alleges that the assault was committed upon a person unknown to the jurors.² The word "attempt" has no prescribed legal meaning; it relates, from its nature, to an unconsummated offense. In an indictment for an attempt to commit a crime, it is essential to aver that the defendant did some act which, directed by a particular intent to be averred, would apparently result, in the ordinary and likely course of things, in a particular crime.³ Nothing shall be given in evidence which does not directly tend to the proof or disproof of the matter in issue. But whether a given fact, bearing indirectly on a matter in issue, should be received as circumstantial, or rejected as conjectural evidence, is often a question of extreme difficulty. In the proof of intention it is not always necessary that the evidence should apply directly to the particular act with the commission of which the party is charged, for the unlawful intent in the particular case may well be inferred from a similar intent, proved to have existed in other transactions done before or after that time. Instances of what is held to be admissible and inadmissible under this rule are given in the case cited in the note.⁴ It is reversible error to admit evidence of transactions occurring six months after the crime was committed to show that the defendant was a dangerous man and liable to kill anyone that provoked him.⁵ On the trial of an indictment charging assault with a revolver, evidence tending to show that the complaining witness was a trespasser on the defendant's land, and that in fact the defendant was the owner of said land, is inadmissible.⁶ A charge to a jury in a murder case which in part read: ". . . and that said killing was not in the necessary defense of the defendant's life or to prevent the infliction upon him of great bodily harm, then it is your duty to find the defendant guilty . . ." was held to be reversible error. The United States Supreme Court held that at the defendant's instance the charge should have been modified to state that "if

² *United States v. Davis*, 4 Cranch (C. C.), 333, Fed. Cas. No. 14924.

³ *United States v. Barnaby*, 51 Fed. 20.

⁴ *Bird v. United States*, 180 U. S. 356, 45 L. ed. 570, 21 S. C. 403.

⁵ *Bird v. United States*, 180 U. S. 356, 45 L. ed. 570, 21 S. C. 403.

⁶ *Hickey v. United States*, 168 Fed. 536, 93 C. C. A. 616 (9th Cir.).

the defendant believed, and had reason to believe, that the killing was necessary for the defense of his life or to prevent the infliction upon him of great bodily harm, then he was not guilty.”⁷ Although the Criminal Code does not define the crime of rape, yet the objection that this section is invalid because of that defect is untenable, the reason being that the crime was one well known and defined by the common law.⁸ It is no defense to assert that the defendant attacked the complaining witness because the latter was a trespasser on the former’s property. If the defendant wants to eject the complaining witness from his property the law provides a peaceable and legal remedy therefor.⁹ Pointing an unloaded revolver at the complaining witness is not an assault with a dangerous weapon; it was held to be, however, a case of ordinary assault. This is so, even though the complaining witness did not know that the revolver was not loaded and hid under a table for safety.¹⁰ Raising a club over a person’s head and threatening to strike if that person spoke is an assault.¹¹ Where a defendant doubled his fist and ran it towards the complaining witness, saying, “If you say so again, I will knock you down,” the act was held to be an assault.¹² Cocking a gun and threatening to shoot, coupled with the intention to shoot or injure, although the attempt is not actually made, is an assault.¹³

§ 938. Criminal Code. Sec. 277. Attempt to Commit Murder or Manslaughter.

Whoever shall attempt to commit murder or manslaughter, except as provided in the preceding section, shall be fined not more than one thousand dollars and imprisoned not more than three years.¹

⁷ *Bird v. United States*, 180 U. S. 356, 45 L. ed. 570, 21 S. C. 403.

⁸ *Oliver v. United States*, 230 Fed. 971, 145 C. C. A. 165 (9th Cir.).

⁹ *Hickey v. United States*, 168 Fed. 536, 93 C. C. A. 616 (9th Cir.).

¹⁰ *Price v. United States*, 156 Fed. 950, 85 C. C. A. 247 (9th Cir.).

¹¹ *United States v. Richardson*,

5 Cranch (C. C.), 348, Fed. Cas. No. 16155.

¹² *United States v. Myers*, 1 Cranch (C. C.), 310, Fed. Cas. No. 15845.

¹³ *United States v. Kierman*, 3 Cranch (C. C.), 435, Fed. Cas. No. 15529.

§ 938. ¹ Formerly R. S. Sec. 5342, 35 Stat. L. 1143.

Under this section, an attempt to commit murder must amount to something more than an assault with a dangerous weapon.²

§ 939. Criminal Code. Sec. 278. Rape.

Whoever shall commit the crime of rape shall suffer death.¹

This statute was held to be constitutional.² It has no application to an Indian if the act was committed on an Indian reservation.³ This section is applicable to the District of Columbia, but the procedure is governed by the code of the District of Columbia.⁴

§ 940. Criminal Code. Sec. 279. Having Carnal Knowledge of Female under Sixteen.

Whoever shall carnally and unlawfully know any female under the age of sixteen years, or shall be accessory to such carnal and unlawful knowledge before the fact, shall, for a first offense, be imprisoned not more than fifteen years, and for a subsequent offense be imprisoned not more than thirty years.¹

An indictment is not bad although it contains the double charge of common law rape and the statutory offense described in this section.²

§ 941. Criminal Code. Sec. 280. Seduction of Female Passenger on Vessel.

Every master, officer, seaman, or other person employed on board of any American vessel who, during the voyage, under promise of marriage, or by threats, or the exercise of authority, or solicitation, or the making of gifts or presents, seduces and has illicit connection with any female passenger, shall be fined not more than one thousand dollars, or

² *United States v. Barnaby*, 51 Fed. 20.

§ 939. ¹ Formerly R. S. Sec. 5345, 35 Stat. L. 1143. See also notes under § 937, *supra*.

² *Oliver v. United States*, 230 Fed. 971, 145 C. C. A. 165 (9th Cir.).

³ *United States v. Ward*, 42 Fed.

320, *approved* as to status in *Farrel v. United States*, 110 Fed. 944.

⁴ *Johnson v. United States*, 225 U. S. 405, 56 L. ed. 1142, 32 S. C. 748.

§ 940. ¹ 35 Stat. L. 1143.

² *Matter of Lane*, 135 U. S. 443 34 L. ed. 219, 10 S. C. 760.

imprisoned not more than one year, or both ; but subsequent intermarriage of the parties may be pleaded in bar of conviction.¹

§ 942. Criminal Code. Sec. 281. Payment of Fine to Female Seduced ; Evidence Required ; Limitation on Indictment.

When a person is convicted of a violation of the section last preceding, the court may, in its discretion, direct that the amount of the fine, when paid, be paid for the use of the female seduced, or her child, if she have any ; but no conviction shall be had on the testimony of the female seduced, without other evidence, nor unless the indictment is found within one year after the arrival of the vessel on which the offense was committed at the port of its destination.¹

§ 943. Criminal Code. Sec. 282. Loss of Life by Misconduct of Officers, etc., of Vessels.

Every captain, engineer, pilot, or other person employed on any steamboat or vessel by whose misconduct, negligence, or inattention to his duties on such vessel the life of any person is destroyed, and every owner, charterer, inspector, or other public officer, through whose fraud, neglect, connivance, misconduct, or violation of law the life of any person is destroyed, shall be fined not more than ten thousand dollars, or imprisoned not more than ten years, or both : *Provided*, That when the owner or charterer of any steamboat or vessel shall be a corporation, any executive officer of such corporation, for the time being actually charged with the control and management of the operation, equipment, or navigation of such steamboat or vessel, who has knowingly and willfully caused or allowed such fraud, neglect, connivance, misconduct, or violation of law, by which the life of any person is destroyed, shall be fined not more than ten thousand dollars, or imprisoned not more than ten years, or both.¹

An indictment under this section need not allege that the offenses were committed at a place under the exclusive jurisdiction of the

§ 941. ¹ Formerly R. S. Sec. 5349,
35 Stat. L. 1143.

§ 943. ¹ Formerly R. S. Sec. 5344,
35 Stat. L. 1144.

§ 942. ¹ Formerly R. S. Sec. 5350,
5351, 35 Stat. L. 1144.

United States, or on the high seas, and outside the jurisdiction of any State.² It should appear from the indictment, however, that at the time of the commission of the crime the vessel was within the district where the indictment was found.³ The indictment must show that at the time of the commission of the crime the vessel was used on the navigable waters of the United States.⁴ The word "pilot" having been omitted in the second clause of the statute, he cannot be indicted thereunder. Therefore, to indict him and the captain under this subdivision in one indictment renders it bad for misjoinder of parties and as to him it should be dismissed.⁵ This section does not give the United States Courts exclusive jurisdiction. If the crime is committed within the jurisdiction of a State, that State has concurrent jurisdiction to punish for the commission of such crime.⁶ The necessary elements of the crime denounced by this section are (1) That the defendant was the master of the vessel; (2) that he was guilty of misconduct, negligence or inattention to his duties; (3) that by reason of such misconduct, negligence, or inattention human life was destroyed.⁷ The word "vessel" as used here includes every description of water craft or other artificial contrivance used, or capable of being used, as a means of transportation on water.⁸ The loss of human life must be the direct result of the acts.⁹ It is the duty of the owners and not the masters to properly equip a vessel navigating in home waters. For a violation thereof, resulting in the loss of life, they are liable.¹⁰ Nevertheless, it is the master's duty to exercise the ordinary powers of observation, and he may be held liable if he fails to do so.¹¹ It is the duty of a master of a ship to try to rescue a sailor

² *United States v. Holtzhauer*, 40 Fed. 76.

³ *In re Doig*, 4 Fed. 193.

⁴ *United States v. Beacham*, 29 Fed. 284.

⁵ *United States v. Holtzhauer*, 40 Fed. 76.

⁶ *People v. Welch*, 141 N. Y. 266, 36 N. E. 328, 24 L. R. A. 117. See also *In re Welch*, 57 Fed. 576 and compare with Sec. 256 of the Federal Judicial case.

⁷ *Van Schaick v. United States*, 159 Fed. 847, 850, 87 C. C. A. 27 (2d Cir.); *In re Doig*, 4 Fed. 193.

⁸ *United States v. Holmes*, 104 Fed. 884.

⁹ *United States v. Keller*, 19 Fed. 633.

¹⁰ *United States v. Van Schaick*, 134 Fed. 592.

¹¹ *Ibid.*

of his vessel who fell overboard while at work, provided, however, that by so doing, he does not endanger the lives of the other people aboard and the safety of the ship.¹² The fact that a certificate issued by United States inspectors was filed certifying that a vessel was permitted to navigate is no defense to a prosecution under this section. The duties imposed on the master are separate and distinct from those of the inspectors, and if the latter failed to honestly or properly perform their duties that does not exculpate the master for his violation of the law.¹³ Owners and masters of vessels, who daily have the lives of thousands of helpless human beings in their keeping, should be held to the strictest accountability and required to exercise the highest degree of skill and care.¹⁴ The degree of care that a captain must exercise depends on whether the ship is of steel or wood construction, the personnel of the crew, whether the cargo was of raw material and constantly changing; and on the passengers usually carried, whether it consisted of women and children or ordinary experienced travelers.¹⁵ By misconduct, negligence, or inattention is meant the omission or commission of any act which may naturally lead to the consequences made criminal. The degree of misconduct is wholly immaterial.¹⁶ It is not necessary to charge or prove that the acts resulting in the loss of life were done with criminal intent, maliciously done, or with the purpose to take the life of any person. It is sufficient to charge and prove the misconduct, negligence, or inattention which resulted in the loss of human life.¹⁷

§ 944. Criminal Code. Sec. 283. Maiming.

Whoever, with intent to maim or disfigure, shall cut, bite, or slit, the nose, ear, or lip, or cut out or disable the tongue, or put out or destroy an eye, or cut off or disable a limb or any member of another person; or whoever, with like

¹² *United States v. Knowles*, 4 Sawyer, 517, Fed. Cas. No. 15540.

¹³ *Van Schaick v. United States*, 159 Fed. 847, 87 C. C. A. 27 (2d Cir.).

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ *United States v. Farnham*, 2 Blatch. 528, Fed. Cas. No. 15071;

United States v. Collyer, Fed. Cas. No. 14838.

¹⁷ *United States v. Holmes*, 104 Fed. 884; *United States v. Keller*, 19 Fed. 633; *United States v. Warner*, 4 McLean, 463, Fed. Cas. No. 16643; *United States v. Farnham*, 2 Blatch. 528, Fed. Cas. No. 15071.

intent, shall throw or pour upon another person any scalding hot water, vitriol, or other corrosive acid or caustic substance whatever, shall be fined not more than one thousand dollars, or imprisoned not more than seven years, or both.¹

§ 945. Criminal Code. Sec. 284. Robbery.

Whoever, by force and violence, or by putting in fear, shall feloniously take from the person or presence of another anything of value, shall be imprisoned not more than fifteen years.¹

§ 946. Criminal Code. Sec. 285. Arson of Dwelling House.

Whoever shall willfully and maliciously set fire to, burn, or attempt to burn, or by means of a dangerous explosive destroy or attempt to destroy, any dwelling house, or any store, barn, stable, or other building, parcel of a dwelling house, shall be imprisoned not more than twenty years.¹

This section simply defines the common law crime of arson. Any act not deemed to be arson at common law is, therefore, not made criminal by this section.² It necessarily follows, therefore, that the burning of a schoolhouse is not a crime under this section. At common law the gist of the offense lay in the malicious burning of a building where persons resided, and a schoolhouse is not such a building.³ If part of a schoolhouse is used as a dwelling house it gives the character of a dwelling house to the entire building.⁴ A jail has been held to be a house, within the meaning of the law of arson, when the jailor lives therein with his family.⁵

§ 947. Criminal Code. Sec. 286. Arson of Other Buildings, etc.

Whoever shall maliciously set fire to, burn, or attempt to burn, or by any means destroy or injure, or attempt to

§ 944. ¹ Formerly R. S. Sec. 5348, 35 Stat. L. 1144.

§ 945. ¹ Formerly R. S. Sec. 5370, 35 Stat. L. 1144.

§ 946. ¹ Formerly R. S. Sec. 5385, 35 Stat. L. 1144.

² United States v. Cardish, 143 Fed. 640.

³ *Ibid.*

⁴ United States v. Cardish, 145 Fed. 242, citing *Rex v. Stock, Rus. & Ry.*, 138, 2 Taunt. 339.

⁵ *People v. Van Blaricum*, 2 Johns (N. Y.), 105; *King v. Dunnevan*, 1 Leach Cr. Law, 81.

destroy or injure, any arsenal, armory, magazine, ropewalk, ship house, warehouse, blockhouse, or barrack, or any storehouse, barn, or stable, not parcel of a dwelling house, or any other building not mentioned in the section last preceding, or any vessel built, building, or undergoing repair, or any light-house, or beacon, or any machinery, timber, cables, rigging, or other materials or appliances for building, repairing, or fitting out vessels, or any pile of wood boards, or other lumber, or any military, naval, or victualing stores, arms, or other munitions of war, shall be fined not more than five thousand dollars and imprisoned not more than twenty years.¹

This section greatly enlarges the meaning of arson as understood by the common law.²

§ 948. Criminal Code. Sec. 287. Larceny.

Whoever shall take and carry away, with intent to steal or purloin, any personal property of another, shall be punished as follows: If the property taken is of a value exceeding fifty dollars, or is taken from the person of another, by a fine of not more than ten thousand dollars, or imprisonment for not more than ten years, or both; in all other cases, by a fine of not more than one thousand dollars, or by imprisonment not more than one year, or both. If the property stolen consists of any evidence of debt, or other written instrument, the amount of money due thereon, or secured to be paid thereby, and remaining unsatisfied, or which in any contingency might be collected thereon, or the value of the property the title to which is shown thereby, or the sum which might be recovered in the absence thereof, shall be deemed to be the value of the property stolen.¹

An indictment which states the county in which the crime was committed and also states that this was within the Indian country sufficiently states the venue to confer jurisdiction on the Federal Court.² The Federal Courts have no jurisdiction to punish for the crime of larceny when it is committed on board a vessel

§ 947. ¹ Formerly R. S. Sec. 5386, 5387, 35 Stat. L. 1144.

² United States v. Cardish, 143 Fed. 640. Consult notes under § 946.

§ 948. ¹ Formerly R. S. Sec. 5356, 35 Stat. L. 1144.

² United States v. Ewing, 47 Fed. 809.

in waters within the jurisdiction of a State.³ Larceny committed on an Indian Reservation by a white man of the goods of another white man is punishable in the Federal Courts.⁴ The Federal Courts have jurisdiction to punish a white man for larceny committed by him on an Indian Reservation.⁵ Fish in a pound so constructed that they very rarely were able to escape are so reduced to possession that the taking of them by strangers is larceny.⁶ Where a court upon a conviction under this section orders the incarceration of a defendant for one year or less in a *state penitentiary* it exceeds its powers and acts without jurisdiction. The defendant will be released on *habeas corpus*.⁷ The court has no right to instruct the jury that they may infer knowledge that the property was stolen.⁸

§ 949. Criminal Code. Sec. 288. Receiving, etc., Stolen Goods.

Whoever shall buy, receive, or conceal, any money, goods, bank notes, or other thing which may be the subject of larceny, which has been feloniously taken, stolen, or embezzled, from any other person, knowing the same to have been so taken, stolen, or embezzled, shall be fined not more than one thousand dollars and imprisoned not more than three years; and such person may be tried either before or after conviction of the principal offender.¹

An indictment under this section need not state that the defendant received the property without the consent of the owner, as the act characterized proceeds from a criminal intent and evil purpose and thus excludes all color of right or title.² The word "knowing" as used here does not mean actual knowledge of the theft. Facts which create a mere suspicion are not sufficient

³ United States v. Rogers, 46 Fed. 1.

⁴ Cochran v. United States, 147 Fed. 206, 77 C. C. A. 432 (8th Cir.); Brown v. United States, 146 Fed. 975, 77 C. C. A. 173 (8th Cir.).

⁵ United States v. Bridleman, 7 Fed. 894.

⁶ Miller v. United States, 242 Fed. 907, 155 C. C. A. 495 (3d Cir.);

Peterson v. United States, 213 Fed. 920, 130 C. C. A. 398 (9th Cir.).

⁷ Re Bonner, 151 U. S. 242, 38 L. ed. 149, 14 S. C. 323.

⁸ Peterson v. United States, *supra*. § 949. ¹ Formerly R. S. Sec. 5357, 35 Stat. L. 1145.

² Bise v. United States, 144 Fed. 374, 74 C. C. A. 1 (8th Cir.).

when the defendant acts in good faith and pays full value.³ In one case⁴ the Supreme Court of the United States held that a judgment of conviction against the thief is not evidence against one charged with receiving stolen property under this section because a defendant has the constitutional right to be confronted with the witnesses against him.

§ 950. Criminal Code. Sec. 289. Laws of States Adopted for Punishing Wrongful Acts, etc.

Whoever, within the territory limits of any State, organized Territory, or District, but within or upon any of the places now existing or hereafter reserved or acquired, described in section two hundred and seventy-two of this Act, shall do or omit the doing of any act or thing which is not made penal by any law of Congress, but which if committed or omitted within the jurisdiction of the State, Territory, or District in which such place is situated, by the laws thereof now in force would be penal, shall be deemed guilty of a like offense and be subject to a like punishment; and every such State, Territorial, or District law shall, for the purposes of this section, continue in force, notwithstanding any subsequent repeal or amendment thereof by any such State, Territory, or District.¹

The effect of this section is limited to the laws of the several States in force at the time of its enactment.² It has been held that this section does not delegate to the States authority to change the criminal laws applicable to places over which the United States has jurisdiction, and the objection that it is for that reason unconstitutional is untenable.³ To an indictment drawn under this section the Federal Statutes of limitations may be pleaded as a defense. A forgery committed in a government building

³ *Peterson v. United States*, 213 Fed. 920, 130 C. C. A. 398 (9th Cir.).

⁴ *Kirby v. United States*, 174 U. S. 47, 43 L. ed. 890, 19 S. C. 574.

§ 950. ¹ Formerly R. S. Sec. 5391, 35 Stat. L. 1145.

² *Franklin v. United States*, 216 U. S. 559, 54 L. ed. 615, 30 S. C. 434,

citing *United States v. Paul*, 6 Pet. (U. S.) 141, 143, 8 L. ed. 348; *United States v. Press Publishing Company*, 219 U. S. 1, 55 L. ed. 65, 31 S. C. 212; *United States v. Barnaby*, 51 Fed. 20.

³ *Franklin v. United States*, 216 U. S. 559, 54 L. ed. 615, 30 S. C. 434.

on land ceded by the State to the United States was held to be controlled by the laws of the State.⁴ A newspaper published and circulated in New York City contained an article which was libelous criminally. This paper was distributed on a military reservation and was also deposited in the office of the Postmaster in the Federal Building in New York. *Held*, that the New York State Courts had sufficient authority to punish for the crime as the primary publication was in New York City and not on a reservation, and that, therefore, it was unnecessary to invoke the jurisdiction of the United States Courts under this section. Apparently, this should be done only when the State Court cannot punish for the commission of the crime.⁵ This section does not apply to the District of Columbia.⁶ Where the land is ceded to the United States and there is no declaration or intention to cede exclusive jurisdiction over such land to the United States, the State retains jurisdiction and may punish for crimes committed thereon.⁷ Notwithstanding the fact that the National Government took over Jackson Park with the consent of the people for the purpose of holding the World's Exposition, the State laws remained in full force and effect as the entry was temporary.⁸ The United States courts have no jurisdiction to punish an Indian, residing on an Indian Reservation, for the crime of assault with intent to commit rape, notwithstanding this section.⁹ Murder committed on board a United States battleship moored at a dock on land ceded to the Federal Government is punishable in the Federal Courts.¹⁰ Land ceded by the State of Kentucky for the purpose of providing and maintaining locks and dams on the Green River is within the exclusive jurisdiction of the United States.¹¹ The Virginia State Courts do not have jurisdiction over the Norfolk Navy Yard. It would seem, there-

⁴ *United States v. Andem*, 158 Fed. 996.

⁵ *United States v. Press Publishing Company*, 219 U. S. 1, 55 L. ed. 65, 31 S. C. 212.

⁶ *Johnson v. United States*, 225 U. S. 405, 416, 56 L. ed. 1142, 32 S. C. 748.

⁷ *In re Kelly*, 71 Fed. 545.

⁸ *United States v. World's Columbian Exposition*, 56 Fed. 630.

⁹ *United States v. King*, 81 Fed. 625. *See also* *Ex parte Hart*, 157 Fed. 130; *United States v. Barnaby*, 51 Fed. 20.

¹⁰ *United States v. Carter*, 84 Fed. 622.

¹¹ *United States v. Tucker*, 122 Fed. 518.

fore, that a crime committed therein would be punishable in the United States Courts.¹² This section gives the Federal Courts jurisdiction over a crime committed in a United States post office building.¹³

¹² *Western Union Telegraph Co. v. Chiles*, 214 U. S. 274, 53 L. ed. 994, 29 S. C. 613.

¹³ *United States v. Andem*, 158 Fed. 996; *Sharon v. Hill*, 24 Fed. 726.

CHAPTER LVII

CRIMINAL CODE, CHAPTER TWELVE

PIRACY AND OTHER OFFENSES UPON THE SEAS

- § 951. Crim. Code § 290. Piracy under the Law of Nations.
- § 952. Crim. Code § 291. Maltreatment of Crew by Officers of Vessel.
- § 953. Crim. Code § 292. Inciting Revolt or Mutiny on Shipboard.
- § 954. Crim. Code § 293. Revolt and Mutiny on Shipboard.
- § 955. Crim. Code § 294. Seaman Laying Violent Hands on His Commander.
- § 956. Crim. Code § 295. Abandonment of Mariners in Foreign Ports.
- § 957. Crim. Code § 296. Conspiracy to Cast Away Vessel.
- § 958. Crim. Code § 297. Plundering Vessel in Distress, etc.
- § 959. Crim. Code § 298. Attacking Vessel with Intent to Plunder.
- § 960. Crim. Code § 299. Breaking and Entering Vessel, etc.
- § 961. Crim. Code § 300. Owner Destroying Vessel at Sea.
- § 962. Crim. Code § 301. Other Person Destroying or Attempting to Destroy Vessel at Sea.
- § 963. Crim. Code § 302. Robbery on Shore by Crew of Piratical Vessel.
- § 964. Crim. Code § 303. Arming Vessel to Cruise against Citizens of the United States.
- § 965. Crim. Code § 304. Piracy under Color of a Foreign Commission.
- § 966. Crim. Code § 305. Piracy by Subjects or Citizens of a Foreign State.
- § 967. Crim. Code § 306. Running Away with or Yielding up Vessel or Cargo.
- § 968. Crim. Code § 307. Confederating, etc., with Pirates.
- § 969. Crim. Code § 308. Sale of Arms and Intoxicants Forbidden in Pacific Islands.
- § 970. Crim. Code § 309. Offenses under Preceding Section Deemed on High Seas.
- § 971. Crim. Code § 310. "Vessels of the United States" Defined.

§ 951. Criminal Code. Sec. 290. Piracy under the Law of Nations.

Whoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought

into or found in the United States, shall be imprisoned for life.¹

The nationality or registry of the ship on which the crime is committed is immaterial.² Robbery, or forcible depredations upon the sea, *animo furandi*, is piracy.³ The right to capture a vessel as piratical will depend on whether or not it has been commissioned as a vessel of war by a duly constituted and recognized government.⁴ "Rebels who have never obtained recognition from any other power are clearly not a sovereign state in the eye of international law, and their vessels sent out to commit violence on the high seas are therefore piratical within this definition."⁵ General piracy, or murder, or robbery, committed by persons on board of a vessel not at the time belonging to the subjects of any foreign power, but in possession of a crew acting in defiance of all law, and acknowledging obedience to no government whatever, is within the meaning of this section, and is punishable in the Courts of the United States.⁶

§ 952. Criminal Code. Sec. 291. Maltreatment of Crew by Officers of Vessel.

Whoever, being the master or officer of a vessel of the United States, on the high seas, or on any other waters within the admiralty and maritime jurisdiction of the United States, beats, wounds, or without justifiable cause, imprisons any of the crew of such vessel, or withholds from them suitable food and nourishment, or inflicts upon them any cruel and unusual punishment, shall be fined not more than one thousand dollars, or imprisoned not more than five years, or both. Nothing herein contained shall be

§ 951. ¹ Formerly R. S. Sec. 5368, 35 Stat. L. 1145.

² *United States v. Palmer*, 3 Wheat. 610, 4 L. ed. 471; *United States v. Bowers*, 5 Wheat. 191, 199, 5 L. ed. 64; *United States v. Holmes*, 5 Wheat. 412, 5 L. ed. 122.

³ *United States v. Smith*, 5 Wheat. 153, 5 L. ed. 57, and cases cited; *United States v. Palmer*, 3 Wheat. 610, 4 L. ed. 471; *Dana's Wheat*.

Int. Law, § 122; *Davison v. Seal-skins*, 2 Paine, 324, Fed. Cas. No. 3661.

⁴ *The Ambrose Light*, 25 Fed. 408.

⁵ Per Judge Brown in *The Ambrose Light*, 25 Fed. 408, 412.

⁶ *United States v. Klintock*, 5 Wheat. 144, 5 L. ed. 55; *United States v. Holmes*, 5 Wheat. 412, 5 L. ed. 122.

construed to repeal or modify section forty-six hundred and eleven of the Revised Statutes.¹

Section 41 of the Judicial Code provides: "The trial of all offenses committed upon the high seas, or elsewhere out of the jurisdiction of any particular state or district, shall be in the district where the offender is found, or into which he is first brought." The word "brought" is synonymous with "carried." The word "found" means "apprehended."² The words "other officer" as used here include any person designated by the captain to act as "captain of the watch" or any similar position.³ A civil as well as a criminal action may be brought by a member of the crew for withholding suitable food and nourishment.⁴ The withholding of suitable food or inflicting cruel or unusual punishment must be tainted with malice, hatred, or revenge, and without justifiable cause. A mere error in judgment or mere negligence would, therefore, be insufficient to sustain a conviction.⁵ Under the Ashburton Treaty, a person extradited from Great Britain to this country to stand trial on a charge of murder cannot be tried for the commission of a crime under this section.⁶

§ 953. Criminal Code. Sec. 292. Inciting Revolt or Mutiny on Shipboard.

Whoever, being of the crew of a vessel of the United States, on the high seas, or on any other waters within the admiralty and maritime jurisdiction of the United States, endeavors to make a revolt or mutiny on board such vessel, or combines, conspires, or confederates with any other person on board to make such revolt or mutiny, or solicits, incites, or stirs up any other of the crew to disobey or resist the lawful orders of the master or other officer of such vessel, or to refuse or neglect their proper duty on

§ 952. ¹ Formerly R. S. Sec. 5347, 35 Stat. L. 1145.

² *United States v. Townsend*, 219 Fed. 761.

³ *United States v. Trice*, 30 Fed. 490; *Memphis & Newport Packet Co. v. Hill*, 122 Fed. 246, 58 C. C. A. 610 (8th Cir.).

⁴ *The Edward R. West*, 212 Fed.

287; *The T. F. Oakes*, 82 Fed. 759; *Riley v. Allen*, 23 Fed. 46, citing *United States v. Collins*, 2 Curt. 194, Fed. Cas. No. 14836. See also Sec. 4568 of the R. S.

⁵ *United States v. Reed*, 86 Fed. 308; *The T. F. Oakes*, 82 Fed. 759.

⁶ *United States v. Rauscher*, 119 U. S. 407, 30 L. ed. 425, 7 S. C. 234.

board thereof, or to betray their proper trust, or assembles with others in a tumultuous and mutinous manner, or makes a riot on board thereof, or unlawfully confines the master or other commanding officer thereof, shall be fined not more than one thousand dollars, or imprisoned not more than five years, or both.¹

To sustain a conviction under this section it is necessary to prove that the crime was committed on the high seas on board an American vessel and that the defendants were members of the crew of such vessel. The defendants "must exhaust all reasonable efforts for relief from alleged hardships before resorting to mutiny; otherwise there can be no justification for it either in law or common sense."² It is not necessary to prove in order to sustain a conviction that the defendants used some violence, fraud, force, or intimidation; if there is a conspiracy among the crew or some of them, that is sufficient.³ Any officer, not including the captain or master, is considered as being "the crew" of the vessel and is within the meaning of this section.⁴ A mate whom the captain tries to discharge, but permits to remain on the vessel, is amenable to this section as long as he remains on board, notwithstanding that technically it may be said that he has ceased to be "of the crew" of the vessel.⁵

§ 954. Criminal Code. Sec. 293. Revolt and Mutiny on Shipboard.

Whoever, being of the crew of a vessel of the United States, on the high seas, or on any other waters within the admiralty and maritime jurisdiction of the United States, unlawfully and with force, or by fraud, or intimidation, usurps the command of such vessel from the master or other lawful officer in command thereof, or deprives him of authority and command on board, or resists or prevents him in the free and lawful exercise thereof, or transfers such authority and command to another not lawfully entitled thereto, is guilty of a revolt and mutiny, and

§ 953. ¹ Formerly R. S. Sec. 5359, 35 Stat. L. 1146.

² United States v. Reid, 210 Fed. 486.

³ In re Simpson, 119 Fed. 620, 623; United States v. Huff, 13 Fed. 630.

⁴ United States v. Huff, 13 Fed. 630.

⁵ *Ibid.*

shall be fined not more than two thousand dollars and imprisoned not more than ten years.¹

The offense consists in the endeavor of the crew of a vessel, or any one or more of them, to overthrow the legitimate authority of her commander, with intent to remove him from his command, or against his will to take possession of the vessel by assuming the government and navigation of her, or by transferring their obediences from the lawful commander to some other person.² Confining the master so that he is unable to exercise command of the vessel is a crime under this section.³

§ 955. Criminal Code. Sec. 294. Seaman Laying Violent Hands on His Commander.

Whoever, being a seaman, lays violent hands upon his commander, thereby to hinder and prevent his fighting in defense of his vessel or goods intrusted to him, is a pirate, and shall be imprisoned for life.¹

§ 956. Criminal Code. Sec. 295. Abandonment of Mariners in Foreign Ports.

Whoever, being master or commander of a vessel of the United States, while abroad, maliciously and without justifiable cause forces any officer or mariner of such vessel on shore, in order to leave him behind in any foreign port or place, or refuses to bring home again all such officers and mariners of such vessel whom he carried out with him, as are in a condition to return and willing to return, when he is ready to proceed on his homeward voyage, shall be fined not more than five hundred dollars, or imprisoned not more than six months, or both.¹

The terms "officers and mariners" as used here apply to all persons, other than the captain, employed under shipping articles on the vessel in any capacity.²

§ 954. ¹ Formerly R. S. Sec. 5360, 35 Stat. L. 1146.

² *United States v. Kelly*, 11 Wheat. 417, 6 L. ed. 508; *United States v. Huff*, 13 Fed. 630, 635.

³ *United States v. Reid*, 210 Fed. 486; *United States v. Sharp*, Pet. (C. C.) 118, Fed. Cas. No. 16264;

United States v. Sharp, Pet. (C. C.) 131, Fed. Cas. No. 16265.

§ 955. ¹ Formerly R. S. Sec. 5369, 35 Stat. L. 1146.

§ 956. ¹ Formerly R. S. Sec. 5363, 35 Stat. L. 1146.

² *Case of the Chinese Laborers on Shipboard*, 13 Fed. 291.

§ 957. Criminal Code. Sec. 296. Conspiracy to Cast Away Vessel.

Whoever, on the high seas, or within the United States, willfully and corruptly conspires, combines, and confederates with any other person, such other person being either within or without the United States, to cast away or otherwise destroy any vessel, with intent to injure any person that may have underwritten or may thereafter underwrite any policy of insurance thereon or on goods on board thereof, or with intent to injure any person that has lent or advanced, or may lend or advance, any money on such vessel on bottomry or respondentia; or whoever, within the United States, builds, or fits out, or aids in building or fitting out, any vessel with intent that the same be cast away or destroyed, with the intent hereinbefore mentioned, shall be fined not more than ten thousand dollars and imprisoned not more than ten years.¹

This section contemplates and requires specific intent to injure a person who loaned or advanced money on a vessel.² This section does not apply to conspiracies to destroy a vessel with the intent to injure underwriters.³

§ 958. Criminal Code. Sec. 297. Plundering Vessel in Distress, etc.

Whoever plunders, steals, or destroys any money, goods, merchandise, or other effects, from or belonging to any vessel in distress, or wrecked, lost, stranded, or cast away, upon the sea, or upon any reef, shoal, bank, or rocks of the sea, or in any other place within the admiralty and maritime jurisdiction of the United States, shall be fined not more than five thousand dollars and imprisoned not more than ten years; and whoever willfully obstructs the escape of any person endeavoring to save his life from such vessel, or the wreck thereof; or whoever holds out or shows any false light, or extinguishes any true light, with intent to bring any vessel sailing upon the sea into danger, or distress,

§ 957. ¹ Formerly R. S. Sec. 5364, Fed. 566, 162 C. C. A. 582 (2d Cir.).
35 Stat. L. 1146.

² *Daeche v. United States*, 250

³ *Daeche v. United States*, *supra*.

or shipwreck, shall be imprisoned not less than ten years and may be imprisoned for life.¹

The value of the things plundered, stolen, or destroyed is immaterial.² "But, if you find he took them from the wreck itself, inasmuch as that was not abandoned or deserted, . . . the defendant had no right to go upon it to rescue goods, even to save them; and there would be a presumption of wrongful intent from the mere taking itself, unless it were explained to be for some rightful purpose."³ One who "furnishes and loans" a skiff to other parties who go out to commit the crime denounced by this section may be indicted under this section.⁴ The statute is broader than the ordinary larceny statute as applied to that crime when committed on land. It not only covers larceny but any depredation to a wrecked ship.⁵

§ 959. Criminal Code. Sec. 298. Attacking Vessel with Intent to Plunder.

Whoever, upon the high seas or on any other waters within the admiralty and maritime jurisdiction of the United States, by surprise or by open force, maliciously attacks or sets upon any vessel belonging to another, with an intent unlawfully to plunder the same, or to despoil any owner thereof of any moneys, goods, or merchandise laden on board thereof, shall be fined not more than five thousand dollars and imprisoned not more than ten years.¹

The word "plunder" as used here in describing an intent is a synonym of "despoil."² This section does not require proof of spoliation by the owner of the vessel attacked. "Despoil" as used in this section means to destroy. The placing of a bomb on a vessel which is in the waters of the United States confers jurisdiction on the Federal courts.³

§ 958. ¹ Formerly R. S. Sec. 5358, 35 Stat. L. 1146.

² United States v. Stone, 8 Fed. 232.

³ See Charge to Jury: United States v. Stone, 8 Fed. 232, 239.

⁴ United States v. Sanche, 7 Fed. 715.

⁵ United States v. Stone, 8 Fed. 232.

§ 959. ¹ Formerly R. S. Sec. 5361, 35 Stat. L. 1147.

² United States v. Stone, 8 Fed. 232, 246.

³ Daeche v. United States, 250 Fed. 566, 162 C. C. A. 582 (2d Cir.).

§ 960. Criminal Code. Sec. 299. Breaking and Entering Vessel, etc.

Whoever, upon the high seas or on any other waters within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular State, breaks or enters any vessel, with intent to commit any felony, or maliciously cuts, spoils, or destroys any cordage, cable, buoys, buoy-rope, head-fast, or other fast, fixed to the anchor or moorings belonging to any vessel shall be fined not more than one thousand dollars and imprisoned not more than five years.¹

A vessel within the breakwaters, but which had not been fitted out nor the crew signed up for any voyage, was not on a voyage and therefore not within the admiralty jurisdiction of the United States.²

§ 961. Criminal Code. Sec. 300. Owner Destroying Vessel at Sea.

Whoever, upon the high seas or on any other waters within the admiralty and maritime jurisdiction of the United States, willfully and corruptly casts away or otherwise destroys any vessel, of which he is owner, in whole or in part, with intent to prejudice any person that may underwrite any policy of insurance thereon, or any merchant that may have goods thereon, or any other owner of such vessel, shall be imprisoned for life or for any term of years.¹

On the trial of an indictment under this section where the proof showed that the fire was accidental and not incendiary, it was held to be reversible error to admit evidence of other vessels or automobiles of the defendant being burned and on which he collected insurance.²

§ 962. Criminal Code. Sec. 301. Other Person Destroying or Attempting to Destroy Vessel at Sea.

Whoever, not being an owner, upon the high seas or on any other waters within the admiralty and maritime juris-

§ 960. ¹ Formerly R. S. Sec. 5362, 35 Stat. L. 1147.

² Ex parte O'Hare, 179 Fed. 662, 103 C. C. A. 220 (2d Cir.).

§ 961. ¹ Formerly R. S. Sec. 5365, 35 Stat. L. 1147.

² Fish v. United States, 215 Fed. 544, 132 C. C. A. 56 (1st Cir.).

diction of the United States, willfully and corruptly casts away or otherwise destroys any vessel of the United States to which he belongs, or, willfully, with intent to destroy the same, sets fire to any such vessel, or otherwise attempts the destruction thereof, shall be imprisoned not more than ten years.¹

If the owner of the vessel plans to destroy the vessel and the mate thereof actually destroys it under the plans, the mate commits an offense under this section.² Likewise the master can be held for willfully destroying the vessel with intent to defraud the underwriters although the owner consents or commands the destruction.³

§ 963. Criminal Code. Sec. 302. Robbery on Shore by Crew of Piratical Vessel.

Whoever, being engaged in any piratical cruise, or enterprise, or being of the crew of any piratical vessel, lands from such vessel, and on shore commits robbery, is a pirate, and shall be imprisoned for life.¹

§ 964. Criminal Code. Sec. 303. Arming Vessel to Cruise against Citizens of the United States.

Whoever, being a citizen of the United States, without the limits thereof, fits out and arms, or attempts to fit out and arm, or procures to be fitted out and armed, or knowingly aids or is concerned in furnishing, fitting out, or arming any private vessel of war or privateer, with intent that such vessel shall be employed to cruise or commit hostilities upon the citizens of the United States, or their property, or whoever takes the command of or enters on board of any such vessel, for such intent, or who purchases any interest in any such vessel with a view to share in the profits thereof, shall be fined not more than ten thousand dollars and imprisoned not more than ten years. The trial for such offense, if committed without the limits of the United

§ 962. ¹ Formerly R. S. Sec. 5366, 5367, 35 Stat. L. 1147.

² United States v. Vanraust, 3 Wash. 146, Fed. Cas. No. 16608.

³ United States v. Jacobson, Brun. Col. Cas. 410, Fed. Cas. No. 15461.

§ 963. ¹ Formerly R. S. Sec. 5371, 35 Stat. L. 1147.

States, shall be in the district in which the offender shall be apprehended or first brought.¹

§ 965. Criminal Code. Sec. 304. Piracy under Color of a Foreign Commission.

Whoever, being a citizen of the United States, commits any murder or robbery, or any act of hostility against the United States, or against any citizen thereof, on the high seas, under color of any commission from any foreign prince, or state, or on pretense of authority from any person, is, notwithstanding the pretense of such authority, a pirate, and shall be imprisoned for life.¹

This section refers to citizens of the United States only and not to foreigners.²

§ 966. Criminal Code. Sec. 305. Piracy by Subjects or Citizens of a Foreign State.

Whoever, being a citizen or subject of any foreign state, is found and taken on the sea making war upon the United States, or cruising against the vessels and property thereof, or of the citizens of the same, contrary to the provisions of any treaty existing between the United States and the state of which the offender is a citizen or subject, when by such treaty such acts are declared to be piracy, is guilty of piracy, and shall be imprisoned for life.¹

§ 967. Criminal Code. Sec. 306. Running Away with or Yielding up Vessel or Cargo.

Whoever, being a captain or other officer or mariner of a vessel upon the high seas or on any other waters within the admiralty and maritime jurisdiction of the United States, piratically or feloniously runs away with such vessel, or with any goods or merchandise thereof, to the value of fifty dollars, or who yields up such vessel voluntarily to

§ 964. ¹ Formerly R. S. Sec. 5324, 6, Fed. Cas. No. 14501; 3 Ops. Atty. Gen. 120, Piracy upon the High Seas, 1 Ops. Atty.-Gen. 249.

§ 965. ¹ Formerly R. S. Sec. 5373, 35 Stat. L. 1147.

² United States v. Baker, 5 Blatch. 35 Stat. L. 1147.

any pirate, shall be fined not more than ten thousand dollars, or imprisoned not more than ten years, or both.¹

The court has no jurisdiction if the vessel is owned by foreigners, regardless of where the offense takes place.²

§ 968. Criminal Code. Sec. 307. Confederating, etc., with Pirates.

Whoever attempts or endeavors to corrupt any commander, master, officer, or mariner to yield up or to run away with any vessel, or with any goods, wares, or merchandise, or to turn pirate, or to go over to or confederate with pirates, or in any wise to trade with any pirate, knowing him to be such, or furnishes such pirate with any ammunition, stores, or provisions of any kind, or fits out any vessel knowingly and with a design to trade with, supply, or correspond with any pirate or robber upon the seas; or whoever consults, combines, confederates, or corresponds with any pirate or robber upon the seas, knowing him to be guilty of any piracy or robbery; or whoever, being a seaman, confines the master of any vessel, shall be fined not more than one thousand dollars and imprisoned not more than three years.¹

Any act which is intended to further the scheme is an offense. However, to make out such an offense, criminal participation is essential.²

§ 969. Criminal Code. Sec. 308. Sale of Arms and Intoxicants Forbidden in Pacific Islands.

Whoever, being subject to the authority of the United States, shall give, sell, or otherwise supply any arms, ammunition, explosive substance, intoxicating liquor, or opium to any aboriginal native of any of the Pacific islands lying within the twentieth parallel of north latitude and the fortieth parallel of south latitude, and the one hundred and twentieth meridian of longitude west and one hundred

§ 967. ¹ Formerly R. S. Sec. 5383, 35 Stat. L. 1148.

² United States v. Kessler, 26 Fed. Cas. No. 15528.

§ 968. ¹ Formerly, R. S. Sec. 5384, 35 Stat. L. 1148.

² United States v. Howard, 3 Wash. 340, 26 Fed. Cas. No. 15404.

and twentieth meridian of longitude east of Greenwich, not being in the possession or under the protection of any civilized power, shall be fined not more than fifty dollars, or imprisoned not more than three months, or both. In addition to such punishment, all articles of a similar nature to those in respect to which an offense has been committed, found in the possession of the offender, may be declared forfeited. If it shall appear to the court that such opium, wine, or spirits have been given bona fide for medical purposes, it shall be lawful for the court to dismiss the charge.¹

§ 970. Criminal Code. Sec. 309. Offenses under Preceding Section Deemed on High Seas.

All offenses against the provisions of the section last preceding, committed on any of said islands or on the waters, rocks, or keys adjacent thereto, shall be deemed committed on the high seas on board a merchant ship or vessel belonging to the United States and the Courts of the United States shall have jurisdiction accordingly.¹

§ 971. Criminal Code. Sec. 310. "Vessels of the United States" Defined.

The words "vessel of the United States", wherever they occur in this chapter, shall be construed to mean a vessel belonging in whole or in part to the United States, or any citizen thereof, or any corporation created by or under the laws of the United States, or of any State, Territory, or District thereof.¹

§ 969. ¹ 35 Stat. L. 1148.

§ 971. ¹ 35 Stat. L. 1148.

§ 970. ¹ 35 Stat. L. 1148.

CHAPTER LVIII

CRIMINAL CODE, CHAPTER THIRTEEN

CERTAIN OFFENSES IN THE TERRITORIES

- § 972. Crim. Code § 311. Places within Which Sections of This Chapter Shall Apply.
- § 973. Crim. Code § 312. Circulation of Obscene Literature; Promoting Abortion.
- § 974. Crim. Code § 313. Polygamy.
- § 975. Crim. Code § 314. Unlawful Cohabitation.
- § 976. Crim. Code § 315. Joinder of Counts.
- § 977. Crim. Code § 316. Adultery.
- § 978. Crim. Code § 317. Incest.
- § 979. Crim. Code § 318. Fornication.
- § 980. Crim. Code § 319. Certificates of Marriage; Penalty for Failure to Record.
- § 981. Crim. Code § 320. Prize Fights, Bull Fights, etc.
- § 982. Crim. Code § 321. Definition of "Pugilistic Encounter."
- § 983. Crim. Code § 322. Train Robberies in Territories, etc.

§ 972. Criminal Code. Sec. 311. Places within Which Sections of This Chapter Shall Apply.

Except as otherwise expressly provided, the offenses defined in this chapter shall be punished as hereinafter provided, when committed within any Territory or District, or within or upon any place within the exclusive jurisdiction of the United States.¹

This section extends the jurisdiction to the District of Columbia.²

§ 973. Criminal Code. Sec. 312. Circulation of Obscene Literature; Promoting Abortion.

Whoever shall sell, lend, give away, or in any manner exhibit, or offer to sell, lend, give away, or in any manner

§ 972. ¹ 35 Stat. L. 1148.

U. S. 405, 56 L. ed. 1142, 32 S. C.

² Johnson v. United States, 225

748.

exhibit, or shall otherwise publish or offer to publish in any manner, or shall have in his possession for any such purpose, any obscene book, pamphlet, paper, writing, advertisement, circular, print, picture, drawing, or other representation, figure, or image on or of paper or other material, or any cast, instrument, or other article of an immoral nature, or any drug or medicine, or any article whatever, for the prevention of conception, or for causing unlawful abortion, or shall advertise the same for sale, or shall write or print, or cause to be written or printed, any card, circular, book, pamphlet, advertisement, or notice of any kind, stating when, where, how, or of whom, or by what means, any of the articles above mentioned can be purchased or obtained, or shall manufacture, draw, or print, or in anywise make any of such articles, shall be fined not more than two thousand dollars, or imprisoned not more than five years, or both.¹

§ 974. Criminal Code. Sec. 313. Polygamy.

Every person who has a husband or wife living, who marries another, whether married or single, and any man who simultaneously, or on the same day, marries more than one woman, is guilty of polygamy, and shall be fined not more than five hundred dollars and imprisoned not more than five years. But this section shall not extend to any person by reason of any former marriage whose husband or wife by such marriage shall have been absent for five successive years, and is not known to such person to be living, and is believed by such person to be dead, nor to any person by reason of any former marriage which shall have been dissolved by a valid decree of a competent court, nor to any person by reason of any former marriage which shall have been pronounced void by a valid decree of a competent court, on the ground of nullity of the marriage contract.¹

The right of the sovereignty to prohibit polygamy has been upheld.² The crime is a continuing one and a defendant cannot

§ 973. ¹ Formerly R. S. Sec. 5389,
35 Stat. L. 1149.

§ 974. ¹ Formerly R. S. Sec. 5352,
35 Stat. L. 1149.

² Late Corporation of the Church

of Jesus Christ of Latter-Day Saints
v. United States, 136 U. S. 1, 34 L.
ed. 478, 10 S. C. 792, *citing* Davis v.
Beason, 133 U. S. 333, 33 L. ed. 637,
10 S. C. 299.

be convicted twice for the same crime simply because the acts were committed on different days. To the second indictment the plea of former jeopardy is a complete defense.³ The testimony of the second wife given on a former trial may be read into the record when the accused secreted her so that she could not be produced in court by the government.⁴ Religious belief of the defendant that he was permitted to have more than one wife is no defense to a prosecution for bigamy.⁵ A bigamous or plural wife may testify against the bigamous husband.⁶ A man who holds out to the world two women as his wives, lives in the same house with both of them, spends part of his time with each woman is guilty of polygamy.⁷

§ 975. Criminal Code. Sec. 314. Unlawful Cohabitation.

If any male person cohabits with more than one woman, he shall be fined not more than three hundred dollars, or imprisoned not more than six months, or both.¹

An indictment following the wording of the statute is sufficient.² No proof of actual intercourse is necessary to make out a crime of unlawful cohabitation.³

§ 976. Criminal Code. Sec. 315. Joinder of Counts.

Counts for any or all of the offenses named in the two sections last preceding may be joined in the same information or indictment.¹

§ 977. Criminal Code. Sec. 316. Adultery.

Whoever shall commit adultery shall be imprisoned not more than three years; and when the act is committed between a married woman and a man who is unmarried,

³ *Ex parte Nielsen*, 131 U. S. 176, 33 L. ed. 118, 9 S. C. 672; *Snow v. United States*, 118 U. S. 346, 30 L. ed. 207, 6 S. C. 1059.

⁴ *Reynolds v. United States*, 98 U. S. 145, 25 L. ed. 244.

⁵ *Ibid.*

⁶ *Miles v. United States*, 103 U. S. 304, 26 L. ed. 481.

⁷ *Cannon v. United States*, 116

U. S. 55, 29 L. ed. 561, 6 S. C. 278.

¹ 35 Stat. L. 1149.

² *United States v. Carll*, 105 U. S. 611, 26 L. ed. 1135.

³ *Cannon v. United States*, 116 U. S. 55, 29 L. ed. 561, 6 S. C. 278; *In re Snow*, 120 U. S. 274, 30 L. ed. 658, 7 S. C. 566.

¹ 35 Stat. L. 1149.

both parties to such act shall be deemed guilty of adultery; and when such act is committed between a married man and a woman who is unmarried, the man shall be deemed guilty of adultery.¹

Adultery committed by Indians on an Indian Reservation is not punishable under this section.²

§ 978. Criminal Code. Sec. 317. Incest.

Whoever, being related to another person within and not including the fourth degree of consanguinity computed according to the rules of the civil law, shall marry or cohabit with, or have sexual intercourse with such other so related person, knowing her or him to be within said degree of relationship, shall be deemed guilty of incest, and shall be imprisoned not more than fifteen years.¹

The Alaska Code governs the crime of fornication committed in Alaska,² and this section also has no application to the crime when committed by Indians on an Indian Reservation.³

§ 979. Criminal Code. Sec. 318. Fornication.

If any unmarried man or woman commits fornication, each shall be fined not more than one hundred dollars, or imprisoned not more than six months.¹

This section refers to offenses in the territories and does not embrace offenses within the admiralty and maritime jurisdiction of the United States.²

§ 980. Criminal Code. Sec. 319. Certificates of Marriage; Penalty for Failure to Record.

Every ceremony of marriage, or in the nature of a marriage ceremony of any kind, whether either or both or more of the parties to such ceremony be lawfully competent to be the subjects of such marriage or ceremony or not,

§ 977. ¹ 35 Stat. L. 1149.

² United States v. Quiver, 241 U. S. 602, 60 L. ed. 1196, 36 S. C. 699.

§ 978. ¹ 35 Stat. L. 1149.

² United States v. Worcester, 4 Alaska, 239.

³ Ex parte Hart, 157 Fed. 130.

§ 979. ¹ 35 Stat. L. 1149.

² Ex parte Isojoki, 222 Fed. 151.

shall be certified by a certificate stating the fact and nature of such ceremony, the full name of each of the parties concerned, and the full name of every officer, priest, and person, by whatever style or designation called or known, in any way taking part in the performance of such ceremony, which certificate shall be drawn up and signed by the parties to such ceremony and by every officer, priest, and person taking part in the performance of such ceremony, and shall be by the officer, priest, or other person solemnizing such marriage or ceremony filed in the office of the probate court, or, if there be none, in the office of the court having probate powers in the county or district in which such ceremony shall take place, for record, and shall be immediately recorded, and be at all times subject to inspection as other public records. Such certificate, or the record thereof, or a duly certified copy of such record, shall be prima facie evidence of the facts required by this section to be stated therein in any proceeding, civil or criminal, in which the matter shall be drawn in question. But nothing in this section shall be held to prevent the proof of marriages, whether lawful or unlawful, by any evidence otherwise legally admissible for that purpose. Whoever shall willfully violate any provision of this section shall be fined not more than one thousand dollars, or imprisoned not more than two years, or both. The provisions of this section shall apply only within the Territories of the United States.¹

§ 981. Criminal Code. Sec. 320. Prize Fights, Bull Fights, etc.

Whoever shall voluntarily engage in a pugilistic encounter between man and man or a fight between a man and a bull or any other animal, for money or for other thing of value, or for any championship, or upon the result of which any money or anything of value is bet or wagered, or to see which any admission fee is directly or indirectly charged, shall be imprisoned not more than five years. The provisions of this section shall apply only within the Territories of the United States and the District of Columbia.¹

§ 980. ¹ 35 Stat. L. 1149.

§ 981. ¹ 35 Stat. L. 1150.

§ 982. Criminal Code. Sec. 321. Definition of "Pugilistic Encounter."

By the term "pugilistic encounter" as used in the section last preceding, is meant any voluntary fight by blows by means of fists or otherwise, whether with or without gloves, between two or more men, for money or for a prize of any character, or for any other thing of value, or for any championship, or upon the result of which any money or anything of value is bet or wagered, or to see which any admission fee is directly or indirectly charged.¹

§ 983. Criminal Code. Sec. 322. Train Robberies in Territories, etc.

Whoever shall willfully and maliciously trespass upon or enter upon any railroad train, railroad car, or railroad locomotive, with the intent to commit murder, or robbery, shall be fined not more than five thousand dollars, or imprisoned not more than twenty years, or both. Whoever shall willfully and maliciously trespass upon or enter upon any railroad train, railroad car, or railroad locomotive, with intent to commit any unlawful violence upon or against any passenger on said train, or car, or upon or against any engineer, conductor, fireman, brakeman, or any officer or employee connected with said locomotive, train, or car, or upon or against any express messenger or mail agent on said train or in any car thereof, or to commit any crime or offense against any person or property thereon, shall be fined not more than one thousand dollars, or imprisoned not more than one year, or both. Whoever shall counsel, aid, abet, or assist in the perpetration of any of the offenses set forth in this section, shall be deemed to be a principal therein. Upon the trial of any person charged with any offense set forth in this section, it shall not be necessary to set forth or prove the particular person against whom it was intended to commit the offense, or that it was intended to commit such offense against any particular person.¹

§ 982. ¹ 35 Stat. L. 1150.

§ 983. ¹ 35 Stat. L. 1150.

CHAPTER LIX

CRIMINAL CODE, CHAPTER FOURTEEN

GENERAL AND SPECIAL PROVISIONS

- § 984. Crim. Code § 323. Punishment of Death by Hanging.
- § 985. Crim. Code § 324. No Conviction to Work Corruption of Blood or Forfeiture of Estate.
- § 986. Crim. Code § 325. Whipping and the Pillory Abolished.
- § 987. Crim. Code § 326. Jurisdiction of State Courts.
- § 988. Crim. Code § 327. Pardoning Power.
- § 989. Crim. Code § 328. Indians Committing Certain Crimes; How Punished.
- § 990. Crim. Code § 329. Crimes Committed on Indian Reservations in South Dakota.
- § 991. Crim. Code § 330. Qualified Verdicts in Certain Cases.
- § 992. Crim. Code § 331. Body of Executed Offender May Be Delivered to Surgeon for Dissection.
- § 993. Crim. Code § 332. Who Are Principals.
- § 994. Crim. Code § 333. Punishment of Accessories.
- § 995. Crim. Code § 334. Accessories to Robbery or Piracy.
- § 996. Crim. Code § 335. Felonies and Misdemeanors.
- § 997. Crim. Code § 336. Murder and Manslaughter; Place Where Crime Deemed to Have Been Committed.
- § 998. Crim. Code § 337. Construction of Certain Words.
- § 999. Crim. Code § 338. Omission of Words "Hard Labor" Not to Deprive Court of Power to Impose.
- § 1000. Crim. Code § 339. Arrangement and Classification of Sections.
- § 1001. Crim. Code § 340. Jurisdiction of Circuit and District Courts.

§ 984. Criminal Code. Sec. 323. Punishment of Death by Hanging.

The manner of inflicting the punishment of death shall be by hanging.¹

§ 984. ¹ Formerly R. S. Sec. 5325, 35 Stat. L. 1151.

This section has no application to the District of Columbia where the District Code governs the procedure and defines the offense.² Where a statute provides for punishment by death but does not provide the mode of executing the sentence a judgment directing that the prisoner be shot is within the province of the Court and proper.³

§ 985. Criminal Code. Sec. 324. No Conviction to Work Corruption of Blood or Forfeiture of Estate.

No conviction or judgment shall work corruption of blood or any forfeiture of estate.¹

§ 986. Criminal Code. Sec. 325. Whipping and the Pillory Abolished.

The punishment of whipping and of standing in the pillory shall not be inflicted.¹

§ 987. Criminal Code. Sec. 326. Jurisdiction of State Courts.

Nothing in this Title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof.¹

This section creates an exception to the general rule in regard to the jurisdiction of the Federal Courts.² The State has power to punish for illegal and fraudulent voting for presidential elector.³ A robbery committed on a vessel within tide waters is exclusively within the jurisdiction of the State Courts.⁴ A State Court has no jurisdiction over the offense of passing counterfeit bills.⁵ The same act may be a crime against the United States and also a crime against a State.⁶ A duty may be imposed upon a State

² *Johnson v. United States*, 225 U. S. 405, 56 L. ed. 1142, 32 S. C. 748.

³ *Wilkerson v. Utah*, 99 U. S. 130, 25 L. ed. 345.

⁴ **§ 985.** ¹ Formerly R. S. Sec. 5326, 35 Stat. L. 1151.

⁵ **§ 986.** ¹ Formerly R. S. Sec. 5327, 35 Stat. L. 1151.

⁶ **§ 987.** ¹ Formerly R. S. Sec. 5328, 35 Stat. L. 1151.

² *Sexton v. California*, 189 U. S. 319, 47 L. ed. 833, 23 S. C. 543.

³ *In re Green*, 134 U. S. 377, 33 L. ed. 951, 10 S. C. 586.

⁴ *Ex parte Ballinger*, 88 Fed. 781.

⁵ *Ex parte Houghton*, 8 Fed. 897.

⁶ *Crossley v. California*, 168 U. S. 640, 42 L. ed. 610, 18 S. C. 242; *Sexton v. California*, 189 U. S. 319, 47 L. ed. 833, 23 S. C. 543; *New York v. Eno*, 155 U. S. 89, 39 L. ed. 80, 15 S. C. 30; *Ex parte Geisler*, 50 Fed. 411.

official by Congress. A false oath taken before a State official in a contested election of a member of Congress is punishable under the laws of the United States and in the courts of the latter.⁷

§ 988. Criminal Code. Sec. 327. Pardoning Power.

Whenever, by the judgment of any court or judicial officer of the United States, in any criminal proceeding, any person is sentenced to two kinds of punishment, the one pecuniary and the other corporal, the President shall have full discretionary power to pardon or remit, in whole or in part, either one of the two kinds, without, in any manner, impairing the legal validity of the other kind, or of any portion of either kind, not pardoned or remitted.¹

A pardon condones infractions¹ of the peace of the State and differs from an amnesty which is addressed to crimes against the sovereignty of the State and to political offenses.²

§ 989. Criminal Code. Sec. 328. Indians Committing Certain Crimes; How Punished.

All Indians committing against the person or property of another Indian or other person any of the following crimes, namely — murder, manslaughter, rape, assault with intent to kill, assault with a dangerous weapon, arson, burglary, and larceny, within any Territory of the United States, and either within or without an Indian reservation, shall be subject therefor to the laws of such Territory relating to said crimes, and shall be tried therefor in the same courts and in the same manner and shall be subject to the same penalties as are all other persons charged with the commission of said crimes respectively and the said courts are hereby given jurisdiction in all such cases. And all such Indians committing any of the above-named crimes against the person or property of another Indian or other person within the boundaries of any State of the United States, and within the limits of any Indian reser-

⁷ In re Loney, 134 U. S. 372, 33 L. ed. 949, 10 S. C. 584.

² Burdick v. United States, 236 U. S. 79, 59 L. ed. 476, 35 S. C. 267.

§ 988. ¹ Formerly R. S. Sec. 5330, 35 Stat. L. 1151. See also Chapter — PARDON.

vation, shall be subject to the same laws, tried in the same courts and in the same manner, and be subject to the same penalties as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States: *Provided*, That any Indian who shall commit the offense of rape upon any female Indian within the limits of an Indian reservation shall be imprisoned at the discretion of the court.¹

In enacting this section, Congress intended to provide, as far as the Penal Code was concerned, for all cases concerning Indians that would be prosecuted in the Federal courts.² This section applies to a mixed breed Indian enrolled as a member of the tribe, though the father was a white man and his mother a part blood Indian who had never been enrolled.³ Murder committed by Indians on an Indian reservation is punishable by the laws of the United States in the Federal Courts.⁴ Adultery between Indians on an Indian reservation is not a punishable offense.⁵ An Indian charged in a State Court with a violation of a State statute cannot be taken from the jurisdiction of the State Court by a writ of *habeas corpus* where the offense was not committed on an Indian reservation.⁶ Rape committed by an Indian on an Indian woman, both residing upon an Indian reservation, is not cognizable as a crime by any United States Statute and the United States Courts are without power to punish such an offense.⁷ An illegitimate child of a Choctaw Indian by a negro woman is to be treated as a colored citizen and not as an Indian.⁸ An Indian may not be taken from the jurisdiction of the State courts to answer for an offense not committed on an Indian reservation unless he is held in pursuance to the laws of the United States.⁹ Only the Federal Government can regulate and terminate Indian tribal organizations and the States have no jurisdiction over the subject matter.¹⁰

§ 989. ¹ 35 Stat. L. 1151.

⁶ Ex parte Tilden, 218 Fed. 920.

² United States v. Lewis, 253 Fed. 469.

⁷ United States v. King, 81 Fed. 625.

³ United States v. Gardner, 189 Fed. 690.

⁸ Alberty v. United States, 162 U. S. 499, 40 L. ed. 1051, 16 S. C. 864.

⁴ Apapas v. United States, 233 U. S. 587, 58 L. ed. 1104, 34 S. C. 704.

⁹ Ex parte Tilden, 218 Fed. 920.

⁵ United States v. Quiver, 241 U. S. 602, 60 L. ed. 1196, 36 S. C. 699.

¹⁰ United States, ex rel. Lynn, v. Hamilton, 233 Fed. 685.

§ 990. Criminal Code. Sec. 329. Crimes Committed on Indian Reservations in South Dakota.

The circuit and district courts of the United States for the district of South Dakota shall have jurisdiction to hear, try, and determine all actions and proceedings in which any person shall be charged with the crime of murder, manslaughter, rape, assault with intent to kill, assault with a dangerous weapon, arson, burglary, or larceny, committed within the limits of any Indian reservation in the State of South Dakota. Any person convicted of murder, manslaughter, rape, arson, or burglary, committed within the limits of any such reservation, shall be subject to the same punishment as is imposed upon persons committing said crimes within the exclusive jurisdiction of the United States: *Provided*, That any Indian who shall commit the crime of rape upon any female Indian within any such reservation shall be imprisoned at the discretion of the court. Any person convicted of the crime of assault with intent to kill, assault with a dangerous weapon, or larceny, committed within the limits of any such reservation, shall be subject to the same punishment as is provided in cases of other persons convicted of any of said crimes under the laws of the State of South Dakota. This section is passed in pursuance of the cession of jurisdiction contained in chapter one hundred and six, Laws of South Dakota, nineteen hundred and one.¹

This provision has been held to be constitutional.² An indictment under this section is defective if it does not allege that either the defendant or the person killed was an Indian.³ The United States courts have complete jurisdiction of acts committed on "Indian Lands." A State is powerless to punish an act committed on such land.⁴ Crimes by or against Indians will not be extended unless plainly within the language and meaning of the statute.⁵

§ 990. ¹ 35 Stat. L. 1151.

² *Hollister v. United States*, 145 Fed. 773, 76 C. C. A. 337 (8th Cir.).

³ *United States v. La Plant*, 200 Fed. 92.

⁴ *Ex parte Van Moore*, 221 Fed. 954.

⁵ *United States v. Quiver*, 241 U. S. 602, 60 L. ed. 1196, 36 S. C. 699.

§ 991. Criminal Code. Sec. 330. Qualified Verdicts in Certain Cases.

In all cases where the accused is found guilty of the crime of murder in the first degree, or rape, the jury may qualify their verdict by adding thereto "without capital punishment"; and whenever the jury shall return a verdict qualified as aforesaid, the person convicted shall be sentenced to imprisonment for life.¹

This section does not apply to the District of Columbia.² The jurisdiction of the United States Supreme Court in such a case on a writ of error is not restricted.³ Under this section it has been held that the examination of jurors upon the point of any prejudice against capital punishment should have been confined to an ascertainment of the juror's views and the strength thereof.⁴

§ 992. Criminal Code. Sec. 331. Body of Executed Offender May Be Delivered to Surgeon for Dissection.

The court before which any person is convicted of murder in the first degree, or rape, may, in its discretion, add to the judgment of death, that the body of the offender be delivered to a surgeon for dissection; and the marshal who executes such judgment shall deliver the body, after execution, to such surgeon as the court may direct; and such surgeon, or some person appointed by him, shall receive and take away the body at the time of execution.¹

§ 993. Criminal Code. Sec. 332. Who Are Principals.

Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal.¹

This statute abolished the distinction between principal and accessory and, although the one charged as principal is acquitted,

§ 991. ¹ 35 Stat. L. 1152.

² *Johnson v. United States*, 225 U. S. 405, 56 L. ed. 1142, 32 S. C. 748.

³ *Fitzpatrick v. United States*, 178 U. S. 304, 44 L. ed. 1078, 20 S. C. 944.

⁴ *Mannel v. United States*, 254 Fed. 272, — C. C. A. — (8th Cir.).

§ 992. ¹ Formerly R. S. Sec. 5340, 35 Stat. L. 1152.

§ 993. ¹ Formerly R. S. Sec. 5323, 5427, 35 Stat. L. 1152.

the accessory may be convicted and regarded as a principal.² Under this section an indictment will lie for aiding and abetting a National bank clerk or official in misappropriating the bank funds.³ An indictment for conspiracy will lie for a violation of this section.⁴ Exceptions to the rulings of the trial court must be taken to enable the appellate court to review the conviction.⁵ Each person who procures the commission of an offense against the United States is a principal.⁶ Where a statute provides that an accessory may be prosecuted and convicted as for a substantive felony, the crime is cognizable in any court having jurisdiction of the principal.⁷ Aiding in the alteration of a money order falls within the meaning of this section and all aiders and abettors may be prosecuted as principals.⁸ In a prosecution for aiding and abetting in the violation of the Oleomargarine Act it was held that, no matter how active the coöperation of third persons, they are not subject to the penalties imposed by the Act unless there is the concurrent act of a person engaged in the business of manufacturing oleomargarine, and unless such third persons are charged with aiding and abetting, or otherwise are brought within Section 332 of the Criminal Code, which makes one who aids, abets, counsels, commands, induces, or procures the commission of an offense a principal.⁹ In bankruptcy, although the corporation is not charged as a conspirator, nevertheless individuals may be guilty of a conspiracy which had for its object a scheme to fraudulently conceal the assets of a bankrupt corporation. A corporation itself may be guilty of a concealment of assets in violation of the

² *Kelly v. United States*, 258 Fed. 392, — C. C. A. — (6th Cir.); *Rooney v. United States*, 203 Fed. 928, 122 C. C. A. 230 (9th Cir.).

³ *Hoss v. United States*, 232 Fed. 328, 146 C. C. A. 376 (8th Cir.); *Keliher v. United States*, 193 Fed. 8, 114 C. C. A. 128 (1st Cir.).

⁴ *Fraina v. United States*, 255 Fed. 28, 166 C. C. A. 356 (2d Cir.); *Vane v. United States*, 254 Fed. 32, — C. C. A. — (9th Cir.); *McKnight v. United States*, 252 Fed. 687, 164 C. C. A. 527 (8th Cir.); *Billingsley v. United States*, 249 Fed. 331, 161

C. C. A. 339 (9th Cir.); *United States v. Shevlin*, 212 Fed. 343.

⁵ *Turner v. United States*, 259 Fed. 103, — C. C. A. — (6th Cir.).

⁶ *Ruthenberg v. United States*, 245 U. S. 480, 62 L. ed. 414, 38 S. C. 168; *United States v. Rogers*, 226 Fed. 512.

⁷ *Hoss v. United States*, 232 Fed. 328, 146 C. C. A. 376 (8th Cir.).

⁸ *Dean v. United States*, 246 Fed. 568, 158 C. C. A. 538 (5th Cir.).

⁹ *United States v. Orr*, 223 Fed. 222. *But see United States v. Orr*, 233 Fed. 718.

Bankruptcy Act.¹⁰ The conspiracy section (Crim. Code, Sec. 37) and Section 332 may be read together.¹¹ This section also applies to violations under the Harrison Narcotic Act.¹²

§ 994. Criminal Code. Sec. 333. Punishment of Accessories.

Whoever, except as otherwise expressly provided by law, being an accessory after the fact to the commission of any offense defined in any law of the United States, shall be imprisoned not exceeding one-half the longest term of imprisonment, or fined not exceeding one-half the largest fine prescribed for the punishment of the principal, or both, if the principal is punishable by both fine and imprisonment; or if the principal is punishable by death, then an accessory shall be imprisoned not more than ten years.¹

§ 995. Criminal Code. Sec. 334. Accessories to Robbery or Piracy.

Whoever, without lawful authority, receives or takes into custody any vessel, goods, or other property, feloniously taken by any robber or pirate against the laws of the United States, knowing the same to have been feloniously taken, and whoever, knowing that such pirate or robber has done or committed any such piracy or robbery, on the land or at sea, receives, entertains, or conceals any such pirate or robber, is an accessory after the fact to such robbery or piracy, and shall be imprisoned not more than ten years.¹

An offense committed on land in connection with one committed on the sea is within the meaning of this section.²

§ 996. Criminal Code. Sec. 335. Felonies and Misdemeanors.

All offenses which may be punished by death, or imprisonment for a term exceeding one year, shall be deemed felonies. All other offenses shall be deemed misdemeanors.¹

¹⁰ *United States v. Young & Holland Co.*, 170 Fed. 110; *Kaufman v. United States*, 212 Fed. 613, 129 C. C. A. 149 (2d Cir.).

¹¹ *Goldman v. United States*, 245 U. S. 474, 62 L. ed. 410, 38 S. C. 166.

¹² *United States v. Johnson*, 228 Fed. 251.

§ 994. ¹ Formerly R. S. Sec. 5533 to 5535, 35 Stat. L. 1152.

§ 995. ¹ Formerly R. S. Sec. 5324, 5333, 35 Stat. L. 1152.

² *United States v. Coombs*, 12 Pet. (U. S.) 72, 9 L. ed. 1004.

§ 996. ¹ 35 Stat. L. 1152.

A criminal contempt is made a felony by this section.² One court has refused to decide whether or not this section applies to breaches of internal revenue laws.³ A corporation may be convicted of an offense made a felony by this section.⁴ This section does not affect R. S. § 5209 designating the offense therein described as a misdemeanor and providing for imprisonment for a period in excess of five years, except to define the offense as a felony.⁵ This section applies to violations of the Narcotic Drug Laws even where the offense charged is failure to keep a duplicate of the order.⁶ Section 343 provides that all offenses committed under any law prior to the Act of March 4, 1909, Chapter 321, may be prosecuted with the same effect as if this Act were never passed. Therefore the severity of an offense committed before this Act is not governed by the principal section.⁷ This section does not affect R. S. § 5541 whereby the Court may order that sentences for a period in excess of one year shall be served in a penitentiary and shorter sentences in a jail.⁸

§ 997. Criminal Code. Sec. 336. Murder and Manslaughter; Place Where Crime Deemed to Have Been Committed.

In all cases of murder or manslaughter, the crime shall be deemed to have been committed at the place where the injury was inflicted, or the poison administered, or other means employed which caused the death, without regard to the place where the death occurs.¹

§ 998. Criminal Code. Sec. 337. Construction of Certain Words.

Words used in this title in the present tense include the future as well as the present; words used in the masculine gender include the feminine and neuter; the singular

² *Creekmore v. United States*, 237 Fed. 743, 150 C. C. A. 497 (8th Cir.).

³ *Wood v. United States*, 204 Fed. 55, 122 C. C. A. 369 (4th Cir.).

⁴ *Joplin Mercantile Co. v. United States*, 213 Fed. 926, 131 C. C. A. 160 (8th Cir.).

⁵ *Sheridan v. United States*, 236 Fed. 305, 149 C. C. A. 437 (9th Cir.).

⁶ *United States v. Gaag*, 237

Fed. 728; *United States v. Woods*, 224 Fed. 278.

⁷ *Heike et al. v. United States*, 192 Fed. 83, 112 C. C. A. 615 (2d Cir.).

⁸ *Thompson v. United States*, 204 Fed. 973, 123 C. C. A. 295 (9th Cir.).

§ 997. ¹ Formerly R. S. Sec. 5339, 5341, 35 Stat. L. 1152.

number includes the plural, and the plural the singular; the word "person" and the word "whoever" include a corporation as well as a natural person; writing includes printing and typewriting, and signature or subscription includes a mark when the person making the same intend it as such. The words "this title", wherever they occur herein, shall be construed to mean this Act.¹

§ 999. Criminal Code. Sec. 338. Omission of Words "Hard Labor" Not to Deprive Court of Power to Impose.

The omission of the words "hard labor" from the provisions prescribing the punishment in the various sections of this Act, shall not be construed as depriving the court of the power to impose hard labor as a part of the punishment, in any case where such power now exists.¹

Where an act repealed by § 341 of this Act provided for imprisonment at hard labor and a conviction was had for the same offense under a section of this act which did not so provide, the Court may impose a sentence of imprisonment at hard labor.²

§ 1000. Criminal Code. Sec. 339. Arrangement and Classification of Sections.

The arrangement and classification of the several sections of this title have been made for the purpose of a more convenient and orderly arrangement of the same, and therefore no inference or presumption of a legislative construction is to be drawn by reason of the chapters under which any particular section is placed.¹

§ 1001. Criminal Code. Sec. 340. Jurisdiction of Circuit and District Courts.

The crimes and offenses defined in this Title shall be cognizable in the circuit and district courts of the United States, as prescribed in sections five hundred and sixty-three and six hundred and twenty-nine of the Revised Statutes.¹

§ 998. ¹ 35 Stat. L. 1152.

§ 999. ¹ 35 Stat. L. 1153.

² *Linningen v. Morgan*, 241 Fed. 645, 154 C. C. A. 403 (8th Cir.); *O'Brien v. McClaughry*, 209 Fed. 816, 126 C. C. A. 540 (8th Cir.).

§ 1000. ¹ 35 Stat. L. 1153.

§ 1001. ¹ 35 Stat. L. 1153. The Circuit Courts were abolished by the Federal Judicial Code, and the District Courts of the United States now have exclusive jurisdiction.

CHAPTER LX

CRIMINAL CODE, CHAPTER FIFTEEN,

REPEALING PROVISIONS

- § 1002. Crim. Code § 341. Sections, Acts, and Parts of Acts Repealed.
- § 1003. Crim. Code § 342. Accrued Rights, etc., Not Affected.
- § 1004. Crim. Code § 343. Prosecutions and Punishments.
- § 1005. Crim. Code § 344. Acts of Limitation.
- § 1006. Crim. Code § 345. Date This Act Shall Be Effective.

§ 1002. Criminal Code. Sec. 341. Sections, Acts, and Parts of Acts Repealed.

The following sections of the Revised Statutes and Acts and parts of Acts are hereby repealed :

Sections four hundred and twelve, fifteen hundred and fifty-three, sixteen hundred and sixty-eight; sections seventeen hundred and eighty to seventeen hundred and eighty-three, both inclusive; sections seventeen hundred and eighty-five, seventeen hundred and eighty-seven, seventeen hundred and eighty-eight, seventeen hundred and eighty-nine, twenty-three hundred and seventy-three, twenty-four hundred and twelve, thirty-five hundred and eighty-three, thirty-seven hundred and eight, thirty-seven hundred and thirty-nine, thirty-seven hundred and forty, thirty-seven hundred and forty-two, thirty-eight hundred and thirty-two, thirty-eight hundred and fifty-one, thirty-eight hundred and sixty-nine, thirty-eight hundred and eighty-seven; sections thirty-eight hundred and ninety to thirty-eight hundred and ninety-four, both inclusive; section thirty-eight hundred and ninety-nine; sections thirty-nine hundred and twenty-two to thirty-nine hundred and twenty-five, both inclusive; sections thirty-nine hundred and forty-seven, thirty-nine hundred and fifty-four, thirty-nine hundred seventy-seven, thirty-nine hundred and seventy-

nine; sections thirty-nine hundred and eighty-one to thirty-nine hundred and eighty-six, both inclusive; sections thirty-nine hundred and eighty-eight, thirty-nine hundred and ninety-two, thirty-nine hundred and ninety-five, thirty-nine hundred and ninety-six, four thousand and thirteen, four thousand and sixteen, four thousand and thirty, four thousand and fifty-three, fifty-one hundred and eighty-eight, fifty-one hundred and eighty-nine; sections fifty-two hundred and eighty-one to fifty-two hundred and ninety-one, both inclusive; sections fifty-three hundred and twenty-three to fifty-three hundred and ninety-five, both inclusive; sections fifty-three hundred and ninety-eight to fifty-four hundred and ten, both inclusive; sections fifty-four hundred and thirteen to fifty-four hundred and eighty-four, both inclusive; sections fifty-four hundred and eighty-seven to fifty-five hundred and ten, both inclusive; sections fifty-five hundred and sixteen, fifty-five hundred and eighteen, fifty-five hundred and nineteen; sections fifty-five hundred and twenty-four to fifty-five hundred and thirty-five, both inclusive; sections fifty-five hundred and fifty-one to fifty-five hundred and sixty-seven, both inclusive, of the Revised Statutes:

That part of section thirty-eight hundred and twenty-nine of the Revised Statutes which reads as follows: "And every person who, without authority from the Postmaster-General, sets up or professes to keep any office or place of business bearing the sign, name, or title of post-office, shall, for every such offense, be liable to a penalty of not more than five hundred dollars";

That part of section thirty-eight hundred and sixty-seven of the Revised Statutes which reads as follows: "And any person not connected with the letter-carrier branch of the postal service who shall wear the uniform which may be prescribed shall, for every such offense, be punishable by a fine of not more than one hundred dollars, or by imprisonment for not more than six months, or both";

That part of section four thousand and forty-six of the Revised Statutes which reads as follows: "Every postmaster, assistant, clerk, or other person employed in or connected with the business or operations of any money-order office who converts to his own use, in any way what-

ever, or loans, or deposits in any bank, except as authorized by this title, or exchanges for other funds, any portion of the public money-order funds, shall be deemed guilty of embezzlement; and any such person, as well as every other person advising or participating therein, shall, for every such offense, be imprisoned for not less than six months nor more than ten years, and be fined in a sum equal to the amount embezzled; and any failure to pay over or produce any money-order funds intrusted to such person shall be taken to be *prima facie* evidence of embezzlement; and upon the trial of any indictment against any person for such embezzlement, it shall be *prima facie* evidence of a balance against him to produce a transcript from the money-order account books of the Sixth Auditor. But nothing herein contained shall be construed to prohibit any postmaster depositing, under the direction of the Postmaster-General, in a national bank designated by the Secretary of the Treasury for that purpose, to his own credit as postmaster, any money order or other funds in his charge, nor prevent his negotiating drafts or other evidences of debt through such bank, or through United States disbursing officers, or otherwise, when instructed or required to do so by the Postmaster-General, for the purpose of remitting surplus money-order funds from one post-office to another, to be used in payment of money orders."

"An Act to protect lines of telegraphy constructed or used by the United States from malicious injury and obstruction", approved June twenty-third, eighteen hundred and seventy-four;

"An Act to protect persons of foreign birth against forcible constraint or involuntary servitude", approved June twenty-third, eighteen hundred and seventy-four;

That part of "An Act making appropriations for the service of the Post-Office Department for the fiscal year ending June thirtieth, eighteen hundred and seventy-five, and for other purposes", approved June twenty-third, eighteen hundred and seventy-four, which reads as follows: "That any postmaster who shall affix his signature to the approval of any bond of a bidder or to the certificate of sufficiency of sureties in any contract before the said bond or contract is signed by the bidder or contractor and his

sureties, or shall knowingly, or without the exercise of due diligence, approve any bond of a bidder with insufficient sureties, or shall knowingly make any false or fraudulent certificate shall be forthwith dismissed from office and be thereafter disqualified from holding the office of postmaster, and shall also be deemed guilty of a misdemeanor, and on conviction thereof be punished by a fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or both ”;

Sections one, two, and three of “An Act to protect ornamental and other trees on Government reservations and on lands purchased by the United States, and for other purposes”, approved March third, eighteen hundred and seventy-five;

“An Act to punish certain larcenies and the receivers of stolen goods”, approved March third, eighteen hundred and seventy-five;

“An Act to amend section fifty-four hundred and fifty-seven of the Revised Statutes of the United States, relating to counterfeiting”, approved January sixteenth, eighteen hundred and seventy-seven;

That part of section five of “An Act establishing post-roads, and for other purposes”, approved March third, eighteen hundred and seventy-seven, which reads as follows: “And if any person shall make use of any such official envelope to avoid the payment of postage on his private letter, package, or other matter in the mail, the person so offending shall be deemed guilty of a misdemeanor and subject to a fine of three hundred dollars, to be prosecuted in any court of competent jurisdiction ”;

That part of section one of “An Act making appropriations for the service of the Post-Office Department for the year ending June thirtieth, eighteen hundred and seventy-nine, and for other purposes”, approved June seventeenth, eighteen hundred and seventy-eight, which reads as follows: “And any postmaster who shall make a false return to the auditor, for the purpose of fraudulently increasing his compensation under the provisions of this or any other Act, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be fined in a sum not less than fifty nor more than five hundred dollars, or imprisoned

for a term not exceeding one year, or punished by both such fine and imprisonment, in the discretion of the court; and no postmaster of any class, or other person connected with the postal service, intrusted with the sale or custody of postage stamps, stamped envelopes, or postal cards, shall use or dispose of them in the payment of debts or in the purchase of merchandise or other salable articles, or pledge or hypothecate the same, or sell or dispose of them except for cash, or sell or dispose of postage stamps or postal cards for any larger or less sum than the values indicated on their faces, or sell or dispose of stamped envelopes for a larger or less sum than is charged therefor by the Post-Office Department for like quantities, or sell or dispose of postage stamps, stamped envelopes, or postal cards otherwise than as provided by law and the regulations of the Post-Office Department; and any postmaster or other person connected with the postal service who shall violate any of these provisions shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be fined in any sum not less than fifty nor more than five hundred dollars, or imprisoned for a term not exceeding one year ”;

“ An Act to amend section fifty-four hundred and ninety-seven of the Revised Statutes, relating to embezzlement by officers of the United States”, approved February third, eighteen hundred and seventy-nine;

That part of section one of “ An Act making appropriations for the service of the Post-Office Department for the fiscal year ending June thirtieth, eighteen hundred and eighty, and for other purposes”, approved March third, eighteen hundred and seventy-nine, which reads as follows: “ That nothing contained in section thirty-nine hundred and eighty-two of the Revised Statutes shall be construed as prohibiting any person from receiving and delivering to the nearest post-office or postal car mail matter properly stamped.” Also sections thirteen, twenty-three, twenty-seven, and twenty-eight of said Act;

“ An Act to amend section fifty-four hundred and forty of the Revised Statutes”, approved May seventeenth, eighteen hundred and seventy-nine;

Sections one, three, and four of “ An Act to amend section fifty-three hundred and fifty-two of the Revised Statutes

of the United States, in reference to bigamy, and for other purposes", approved March twenty-second, eighteen hundred and eighty-two;

Sections eleven, twelve, thirteen, fourteen, and fifteen of "An Act to regulate and improve the civil service of the United States", approved January sixteenth, eighteen hundred and eighty-three;

"An Act making a felony for a person to falsely and fraudulently assume or pretend to be an officer or employee acting under authority of the United States or any department or officer thereof, and prescribing a penalty therefor", approved April eighteenth, eighteen hundred and eighty-four;

"An Act to prevent and punish the counterfeiting within the United States of notes, bonds, or other securities of foreign governments", approved May sixteenth, eighteen hundred and eighty-four;

Section nine of "An Act making appropriations for the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with various Indian tribes for the year ending June thirtieth, eighteen hundred and eighty-six, and for other purposes", approved March third, eighteen hundred and eighty-five;

Section two of "An Act to amend the Act entitled 'An Act to modify the money-order system, and for other purposes', approved March third, eighteen hundred and eighty-three", approved January third, eighteen hundred and eighty-seven;

Sections three, four, five, nine, and ten of "An Act to amend an Act entitled 'An Act to amend section fifty-three hundred and fifty-two of the Revised Statutes of the United States, in reference to bigamy, and for other purposes', approved March twenty-second, eighteen hundred and eighty-two", approved March third, eighteen hundred and eighty-seven;

Section two of "An Act relating to permissible marks, printing or writing, upon second, third, and fourth class matter, and to amend the twenty-second and twenty-third sections of an Act entitled 'An Act making appropriations for the service of the Post-Office Department for the fiscal year ending June thirtieth, eighteen hundred and eighty,

and for other purposes' ", approved January twentieth, eighteen hundred and eighty-eight ;

" An Act to amend section fifty-three hundred and eighty-eight of the Revised Statutes of the United States in relation to timber depredations, approved June fourth, eighteen hundred and eighty-eight ;

" An Act relating to postal crimes, and amendatory of the statutes therein mentioned", approved June eighteenth, eighteen hundred and eighty-eight ;

" An Act amendatory of ' An Act relating to postal crimes and amendatory of the statutes therein mentioned', approved June eighteenth, eighteen hundred and eighty-eight, and for other purposes", approved September twenty-sixth, eighteen hundred and eighty-eight ;

" An Act to punish, as a felony, the carnal and unlawful knowing of any female under the age of sixteen years", approved February ninth, eighteen hundred and eighty-nine ;

Sections one and two of " An Act to punish dealers and pretended dealers in counterfeit money and other fraudulent devices for using the United States mails", approved March second, eighteen hundred and eighty-nine ;

Section one of " An Act to amend certain sections of the Revised Statutes relating to lotteries, and for other purposes", approved September nineteenth, eighteen hundred and ninety ;

" An Act further to prevent counterfeiting or manufacture of dies, tools, or other implements used in counterfeiting, and providing penalties therefor, and providing for the issue of search warrants in certain cases", approved February tenth, eighteen hundred and ninety-one ;

" An Act to amend sections fifty-three hundred and sixty-five and fifty-three hundred and sixty-six of the Revised Statutes relating to barratry on the high seas", approved August sixth, eighteen hundred and ninety-four ;

Sections one and two of " An Act for the suppression of lottery traffic through national and interstate commerce and the postal service, subject to the jurisdiction and laws of the United States", approved March second, eighteen hundred and ninety-five ;

" An Act to prohibit prize fighting and pugilism and fights between men and animals, and to provide penalties

therefor in the Territories and the District of Columbia", approved February seventh, eighteen hundred and ninety-six ;

That part of " An Act making appropriations for the Department of Agriculture for the fiscal year ending June thirtieth, eighteen hundred and ninety-five", approved August eighth, eighteen hundred and ninety-four, and that part of " An Act making appropriations for the Department of Agriculture for the fiscal year ending June thirtieth, eighteen hundred and ninety-six", approved March second, eighteen hundred and ninety-five, and that part of " An Act making appropriations for the Department of Agriculture for the fiscal year ending June thirtieth, eighteen hundred and ninety-seven", approved April twenty-fifth, eighteen hundred and ninety-six, which reads as follows: "Any person who shall knowingly issue or publish any weather forecasts or warnings of weather conditions falsely representing such forecasts or warnings to have been issued or published by the Weather Bureau, United States Signal Service, or other branch of the government service, shall be deemed guilty of a misdemeanor, and, on conviction thereof, for each offense be fined in a sum not exceeding five hundred dollars, or imprisoned not to exceed ninety days, or be both fined and imprisoned, in the discretion of the court " ;

That part of " An Act making appropriations for current and contingent expenses of the Indian Department and fulfilling treaty stipulations with various Indian tribes for the fiscal year ending June thirtieth, eighteen hundred and ninety-seven, and for other purposes", approved June tenth, eighteen hundred and ninety-six, which reads as follows: *Provided further*, That hereafter it shall be unlawful for any person to destroy, deface, change, or remove to another place any section corner, quarter-section corner, or meander post on any Government line of survey, or to cut down any witness tree or any tree blazed to mark the line of a Government survey, or to deface, change, or remove any monument or bench mark of any Government survey. That any person who shall offend against any of the provisions of this paragraph shall be deemed guilty of a misdemeanor, and, upon conviction thereof in any court,

shall be fined not exceeding two hundred and fifty dollars or be imprisoned not more than one hundred days. All the fines accruing under this paragraph shall be paid into the Treasury, and the informer in each case of conviction shall be paid the sum of twenty-five dollars”;

“An Act to reduce the cases in which the penalty of death may be inflicted”, approved January fifteenth, eighteen hundred and ninety-seven;

“An Act to prevent the carrying of obscene literature and articles designed for indecent and immoral use from one State or Territory into another State or Territory”, approved February eighth, eighteen hundred and ninety-seven;

“Anrd Act to prevent forest fires on the public domain”, approved February twenty-fourth, eighteen hundred and ninety-seven;

“An Act to prevent the purchasing of or speculating in claims against the Federal Government by United States officers”, approved February twenty-fifth, eighteen hundred and ninety-seven;

“An Act to amend section fifty-four hundred and fifty-nine of the Revised Statutes, prescribing the punishment for mutilating United States coins, and for uttering or passing or attempting to utter or pass such mutilated coins”, approved March third, eighteen hundred and ninety-seven;

Section eighteen of “An Act to amend the laws relating to navigation”, approved March third, eighteen hundred and ninety-seven;

That part of section one of “An Act making appropriations for the service of the Post-Office Department for the fiscal year ending June thirteenth, eighteen hundred and ninety-nine,” approved June thirteenth, eighteen hundred and ninety-eight” which reads as follows: “*Provided*, That any person or persons who shall place or cause to be placed any matter in the mails during the regular weighing period, for the purpose of increasing the weight of the mails with intent to cause an increase in the compensation of the railroad mail carrier over whose route such mail matter may pass, shall be deemed guilty of a misdemeanor, and shall on conviction thereof be fined not less than five hundred dollars nor more than twenty thousand

dollars, and shall be imprisoned at hard labor not less than thirty days nor more than five years”;

Section seventeen of “An Act to provide revenue for the Government, and to encourage the industries of the United States”, approved July twenty-fourth, eighteen hundred and ninety-seven;

Section three of an Act entitled “An Act making appropriations for the service of the Post-Office Department for the fiscal year ending June thirtieth, nineteen hundred and four, and for other purposes”, approved March third, nineteen hundred and three;

“An Act to protect the harbor defenses and fortifications constructed or used by the United States from malicious injury, and for other purposes”, approved July seventh, eighteen hundred and ninety-eight;

“An Act to amend an Act entitled ‘An Act to prevent forest fires on the public domain’, approved February twenty-fourth, eighteen hundred and ninety-seven” approved May fifth, nineteen hundred;

Sections two, three, and four of “An Act to enlarge the powers of the Department of Agriculture, prohibit the transportation by interstate commerce of game killed in violation of local laws, and for other purposes”, approved May twenty-fifth, nineteen hundred;

“An Act to prevent the sale of firearms, opium, and intoxicating liquors in certain islands of the Pacific”, approved February fourteenth, nineteen hundred and two;

“An Act for the suppression of train robbery in the Territories of the United States and elsewhere, and for other purposes”, approved July first, nineteen hundred and two;

“An Act conferring jurisdiction upon the circuit and district courts for the district of South Dakota in certain cases, and for other purposes,” approved February second, nineteen hundred and three;

“An Act to amend section three of the ‘Act further to prevent counterfeiting or manufacturing of dies, tools, or other implements used in manufacturing’, and so forth, approved February tenth, eighteen hundred and ninety-one”, approved March third, nineteenth hundred and three;

“An Act for the protection of the Bull Run Forest Reserve and the sources of the water supply of the city of Portland, State of Oregon,” approved April twenty-eight, nineteen hundred and four;

“An Act to amend the Act of February eighth, eighteen hundred and ninety-seven, entitled ‘An Act to prevent the carrying of obscene literature and articles designed for indecent and immoral use from one State or Territory into another State or Territory’, so as to prevent the importation and exportation of the same”, approved February eighth, nineteen hundred and five;

“An Act to amend section thirteen of chapter three hundred and ninety-four of the Supplement to the Revised Statutes of the United States”, approved March second, nineteen hundred and five;

Section five of “An Act to amend sections forty-four hundred and seventeen, forty-four hundred and fifty-three, forty-four hundred and eighty-eight, and forty-four hundred and ninety-nine of the Revised Statutes relating to misconduct by officers or owners of vessels”, approved March third, nineteen hundred and five;

“An Act to punish the cutting, chipping, or boxing of trees on the public lands”, approved June fourth, nineteen hundred and six.

Sections sixteen, seventeen, and nineteen of “An Act to establish a bureau of immigration and naturalization, and to provide for a uniform rule for the naturalization of aliens throughout the United States”, approved June twenty-ninth, nineteen hundred and six.

An Act entitled “An Act to prohibit corporations from making money contributions in connection with political elections”, approved January twenty-sixth, nineteen hundred and seven.

An Act entitled “An Act to amend sections one, two, and three of an Act entitled ‘An Act to prohibit shanghaiing in the United States’, approved June twenty-eighth, nineteen hundred and six”, approved March second, nineteen hundred and seven.

An Act entitled “An Act to promote the safe transportation in interstate commerce of explosives and other dangerous articles, and to provide penalties for its viola-

tion", approved May thirtieth, nineteen hundred and eight.

An Act entitled "An Act to amend section fifty-four hundred and thirty-eight of the Revised Statutes", approved May thirtieth, nineteen hundred and eight.

Also all other sections and parts of sections of the Revised Statutes and Acts and parts of Acts of Congress, in so far as they are embraced within and superseded by this Act, are hereby repealed; the remaining portions thereof to be and remain in force with the same effect and to the same extent as if this Act had not been passed.¹

A sentence of imprisonment at hard labor may be imposed even where the conviction is had under § 163 which does not provide for hard labor.² The general clause at the end of this section is declaratory of the common law as to repeals of what is "embraced within and superseded by" a subsequent act.³

§ 1003. Criminal Code. Sec. 342. Accrued Rights, etc., Not Affected.

The repeal of existing laws or modifications thereof embraced in this title shall not affect any act done, or any right accruing or accrued, or any suit or proceeding had or commenced in any civil cause prior to said repeal or modifications, but all liabilities under said laws shall continue and may be enforced in the same manner as if said repeal or modifications had not been made.¹

The question whether an earlier statute was repealed by implication is one of legislative intent.²

§ 1004. Criminal Code. Sec. 343. Prosecutions and Punishments.

All offenses committed, and all penalties, forfeitures, or liabilities incurred prior to the taking effect hereof, under any law embraced in, or changed, modified, or repealed by this title, may be prosecuted and punished in the same manner and with the same effect as if this Act had not been passed.¹

§ 1002. ¹ 35 Stat. L. 1153-1159.

§ 1003. ¹ 35 Stat. L. 1159.

² *Linningen v. Morgan*, 241 Fed. 645, 154 C. C. A. 403 (8th Cir.).

² *Heike v. United States*, 192 Fed. 83, 112 C. C. A. 615 (2d Cir.);

³ *Johnson v. United States*, 225 U. S. 405, 56 L. ed. 1142, 32 S. C. 748.

affirmed in 227 U. S. 131, 57 L. ed. 450, 33 S. C. 226.

§ 1004. ¹ 35 Stat. L. 1159.

Where the offense was committed before this act became effective, the prosecution should be under the former law.² This section provides that all offenses committed under any law prior to the Act of March 4, 1909, Chapter 321, may be prosecuted with the same effect as if this Act were never passed. Therefore, the severity of an offense committed before this Act is not governed by Section 335.² Where there is no express repeal of an earlier statute the question of whether there is an implied repeal by a subsequent overlapping statute is one of legislative intent.³ A notation on the back of an indictment that it was found under § 215 Penal Code, in effect after the commission of the offense, does not invalidate the indictment which charged a violation of R. S. § 5480 which applied to the offense under this section.⁴ A prosecution may be maintained under § 215 of this act for using the mails in execution of a scheme to defraud where the scheme was devised before the act became effective but put into execution after the act was in force.⁵ In construing Section 342 of the Federal Criminal Code, Section 13 of the Revised Statutes of the United States should be taken into consideration. That statute reads as follows: "The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture or liability." Under the general principles of the common law, the repeal of a penal statute operates as a remission of all penalties for violations of it committed before its repeal, and a release from prosecution therefore after said repeal, unless there be either a clause in the repealing statute or a provision of some other statute, expressly authorizing such prosecution.⁶ When, during the pendency in an appellate court of an action for a penalty, civil or criminal, the statute prescribing the penalty is repealed, without any saving clause, the appellate

² *Heike v. United States*, 192 Fed. 83, 112 C. C. A. 615 (2d Cir.).

³ *Ibid.*

⁴ *Smith v. United States*, 208 Fed. 131, 125 C. C. A. 353 (8th Cir.).

⁵ *Sandals v. United States*, 213 Fed. 569, 130 C. C. A. 149 (6th Cir.).

⁶ *United States v. Reisinger*, 128 U. S. 398, 32 L. ed. 480, 9 S. C. 99.

court must dispose of the case under the law in force when its decision is given, even though to do so requires the reversal of a judgment which was right when rendered.⁷ In *United States v. Schooner Peggy*,⁸ Chief Justice Marshall said: "It is in the general true that the province of an appellate court is only to inquire whether a judgment when rendered was erroneous or not. But if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. . . . In such a case the court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside." In *Great Northern Railway Company v. United States*,⁹ the Court said: "As the section of the Revised Statutes in question has only the force of a statute, its provisions cannot justify a disregard of the will of Congress as manifested either expressly or by necessary implication in a subsequent enactment. But while this is true the provisions of § 13 are to be treated as if incorporated in and as a part of subsequent enactments, and therefore, under the general principles of construction requiring, if possible, that effect be given to all the parts of a law the section must be enforced unless either by express declaration or necessary implication, arising from the terms of the law, as a whole, it results that the legislative mind will be set at naught by giving effect to the provisions of § 13. For the sake of brevity we do not stop to refer to the many cases from state courts of last resort dealing with the operation of general state statutes like unto § 13, Revised Statute, because we think the views just stated are obvious and their correctness is established by a prior decision of this court concerning that section."¹⁰ There can be no legal conviction nor any valid judgment pronounced upon conviction, unless the law creating the offense be at the time in existence.¹¹

⁷ *Gulf, Colorado & Santa Fe Railway Company v. Dennis*, 224 U. S. 503, 506, 56 L. ed. 860, 32 S. C. 542.

⁸ 1 Cranch 103, 110, 2 L. ed. 49.

⁹ 208 U. S. 452, 52 L. ed. 567, 28 S. C. 313.

¹⁰ Cited with approval in *Hertz v. Woodman*, 218 U. S. 205, 54 L. ed. 1001, 30 S. C. 621.

¹¹ *United States v. Tynen*, 11 Wallace (U. S.) 88, 20 L. ed. 153.

§ 1005. Criminal Code. Sec. 344. Acts of Limitation.

All acts of limitation, whether applicable to civil causes and proceedings, or for the recovery of penalties or forfeitures, embraced in, modified, changed, or repealed by this title, shall not be affected thereby; and all suits or proceedings for causes arising or acts done or committed prior to the taking effect hereof may be commenced and prosecuted within the same time and with the same effect as if said repeal had not been made.¹

§ 1006. Criminal Code. Sec. 345. Date This Act Shall Be Effective.

This Act shall take effect and be in force on and after the first day of January, nineteen hundred and ten.¹

§ 1005. ¹ 35 Stat. L. 1159.

§ 1006. ¹ 35 Stat. L. 1159.

CHAPTER LXI

CONSPIRACY

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§ 1007. Conspiracy to Commit Offense against the United States; All Parties Liable for Acts of One.

Penal Code, Section 37, provides as follows:

“If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than ten thousand dollars, or imprisoned not more than two years, or both.”¹

§ 1008. Applications of the Statute — Public Lands.

The statute has been held to be applicable in the following instances: Conspiracy to defraud the United States by illegally obtaining title to coal and public lands.¹ An indictment for

§ 1007. ¹ Formerly Revised Statute § 5440, 35 Stat. L. 1096.

§ 1008. ¹ United States v. Mun-day, 222 U. S. 175, 56 L. ed. 149, 32 S. C. 53; United States v. Wells, 192 Fed. 870, 113 C. C. A. 194 (2d Cir.); Hedderly v. United States,

193 Fed. 561, 114 C. C. A. 227 (9th Cir.); United States v. Robbins, 157 Fed. 999; United States v. Keitel, 211 U. S. 370, 53 L. ed. 230, 29 S. C. 123; Hyde v. Shine, 199 U. S. 62, 50 L. ed. 90, 25 S. C. 760; Stearns v. United States, 152 Fed.

conspiracy to defraud the United States by improperly obtaining title to public lands was held not to come under this section where the only acts charged were those permissible under the land laws;² also for conspiracy to commit subornation of perjury in proceedings for the purchase and acquisition of public lands.³ In an indictment for conspiracy to commit subornation of perjury⁴ in connection with a soldier's declaratory statements to be filed by defendant as agent covering public lands under the Homestead Law, the perjury set forth in the indictment consisted in false swearing to declaratory statements before notaries public and clerks of the state courts. The indictment was held to charge a crime.⁵

§ 1009. Conspiracies to Defraud Generally.

An indictment lies for a conspiracy to defraud the United States by giving false information regarding the financial condition of a national bank,¹ for conspiracy to give and take rebates from a railroad company,² for conspiracy to violate a statute by making false entries in books of a national bank,³ and for conspiracy to defraud the United States by corruptly administering an Act of Congress, contrary to its true intent and policy.⁴ An agreement by an official of the United States under which he secretly receives any portion of what is paid for supplies furnished on his requisition is one to defraud the United States within the statute.

900, 82 C. C. A. 48 (8th Cir.); *Chaplin v. United States*, 193 Fed. 879, 114 C. C. A. 93 (9th Cir.); *Ex parte Hyde*, 194 Fed. 207; *United States v. Doughten*, 186 Fed. 226; *United States v. Lonabaugh*, 158 Fed. 314; *Lonabaugh v. United States*, 179 Fed. 476, 103 C. C. A. 56 (8th Cir.); *Mays v. United States*, 179 Fed. 610, 103 C. C. A. 168 (9th Cir.); *United States v. Kettenbach*, 175 Fed. 463.

² *United States v. Biggs*, 211 U. S. 507, 53 L. ed. 305, 29 S. C. 181.

³ *Williamson v. United States*, 207 U. S. 425, 52 L. ed. 278, 28 S. C. 163; *Dwinnell v. United States*,

186 Fed. 754, 108 C. C. A. 624 (9th Cir.); *Richards v. United States*, 175 Fed. 911, 99 C. C. A. 401 (8th Cir.).

⁴ *Crim. Code* § 126.

⁵ *United States v. Morehead*, 243 U. S. 607, 61 L. ed. 926, 37 S. C. 458.

§ 1009. ¹ *United States v. Morse*, 161 Fed. 429, 435.

² *Thomas v. United States*, 156 Fed. 897, 84 C. C. A. 477 (8th Cir.).

³ *Scott v. United States*, 130 Fed. 429, 64 C. C. A. 631 (6th Cir.).

⁴ *United States v. Moore*, 173 Fed. 122.

§ 1010. Immigration.

An indictment will lie for conspiring to assist the immigration of contract laborers in violation of the Immigration Act of 1907.¹

§ 1011. Oleomargarine.

An indictment for conspiracy to defraud the United States of the tax due on colored oleomargarine is sufficient, although it charges the crime substantially in the words of the statute.¹

§ 1012. Revenue.

An indictment lies for conspiracy to remove distilled spirits on which the tax has not been paid;¹ a conspiracy to violate the Hepburn Act by the issue of interstate free transportation,² and a conspiracy to defraud the United States by corruptly administering an Act of Congress, contrary to the true intent and policy thereof.³

§ 1013. Election Matters.

Section 37 of the Federal Penal Code has no application to a conspiracy to bribe voters at a general election within a State at which Congressmen and Presidential electors were also chosen.¹ And where the defendants were charged under Sections 19 and 37 with conspiracy in procuring unqualified persons to vote in an election for the nomination of a senator from West Virginia and of casting illegal votes, it was held that as there was no act regulating the nomination of senators, and as the word "election" as used in the Act of June 4th, 1914, c. 103, providing a temporary method for conducting the nomination and election of United States Senators, must be deemed to mean a general and not a primary election, the conspiracy did not fall within

§ 1010. ¹ *United States v. Stevenson* (No. 2), 215 U. S. 200, 54 L. ed. 157, 30 S. C. 37; *Heike v. United States*, 227 U. S. 131, 57 L. ed. 504, 33 S. C. 226.

§ 1011. ¹ *Jelke v. United States*, 255 Fed. 264, — C. C. A. — (7th Cir.); and *see also* chapter—Oleomargarine.

§ 1012. ¹ *Scott v. United States*, 165 Fed. 172, 91 C. C. A. 206 (5th Cir.).

² *United States v. Clark*, 164 Fed. 75.

³ *United States v. Moore*, 173 Fed. 122.

§ 1013. ¹ *United States v. Bathgate*, 246 U. S. 220, 62 L. ed. 676, 38 S. C. 269; *United States v. Gradwell*, 243 U. S. 476, 61 L. ed. 557, 37 S. C. 407.

either section.² Prior to the decision in the Bathgate case,³ a conviction was had for conspiracy under Section 37 to defraud the United States by violating specified laws of the United States by fraudulently procuring a certificate of election as congressman for one not so elected.⁴ Also an offense against the election laws of Indiana and the United States by the failure of the defendant, an inspector of elections, to perform his duty of safe-keeping and delivery of the poll books, tally sheets, and the certificates of the votes was held to fall within the conspiracy statutes.⁵ An indictment for violation of Sections 20 and 37 by conspiring to deprive colored citizens of the right to vote at a congressional election, setting forth the requirements of the State law as to arranging ballots, was held to be sufficient,⁶ and fines were imposed on the defendants.⁷ To the contrary it was held that the conspiracy statute of the United States was not intended for the protection against corruption of a State election at which a representative in Congress is chosen, as well as for the protection of the operations of the organized government.⁸ A conspiracy to influence a congressional election by the bribery of voters is not a conspiracy within Section 37. The history, classification, and use hitherto made of the section show that it was not intended to apply to the conduct of elections.⁹

§ 1014. Peonage.

An indictment will lie for a conspiracy to hold, arrest or return one to a condition of peonage.¹

§ 1015. Spreading Official Information.

An indictment will lie for a conspiracy by promulgation of officially acquired information in regard to the cotton crop.¹

² United States v. O'Toole, 236 Fed. 993.

³ United States v. Bathgate, 246 U. S. 220, 62 L. ed. 676, 38 S. C. 269.

⁴ Aczel v. United States, 232 Fed. 652, 146 C. C. A. 578 (7th Cir.).

⁵ In re Coy, 127 U. S. 731, 32 L. ed. 274, 8 S. C. 1263.

⁶ United States v. Stone, 188 Fed. 836.

⁷ United States v. Stone, 197 Fed. 483.

⁸ United States v. Gradwell, 234 Fed. 446, 61 L. ed. 857, 37 S. C. 407.

⁹ United States v. Gradwell, 243 U. S. 476, 481, 61 L. ed. 857, 37 S. C. 407.

§ 1014. ¹ Harlan v. McGowrin, 218 U. S. 442, 54 L. ed. 1101, 31 S. C. 44.

§ 1015. ¹ Haas v. Henkel, 216 U. S. 462, 54 L. ed. 569, 30 S. C.

§ 1016. Administration of Justice.

Conspiracy to corruptly obstruct and impede the due administration of justice in a court of the United States is a violation of Section 135 of the Penal Code.¹

§ 1017. Interstate Commerce.

Conspiracy to violate Section 10 of the Interstate Commerce Act relative to interference with the handling of freight can be prosecuted under Section 37.¹

§ 1018. Bankruptcy.

Persons who conspire to cause a corporation to commit the offense of knowingly or fraudulently concealing its property from its trustee in bankruptcy are indictable for the conspiracy, and it is immaterial that the corporation is not or cannot be indicted as one of the conspirators.¹

§ 1019. Jurisdiction and Venue.

The rule is now settled that prosecutions for conspiracy may be maintained either in the district in which the conspiracy was entered into, or in any district in which an act was done to effectuate the object of the conspiracy.¹ And if an illegal conspiracy be entered into within the jurisdiction of the court the

249; *United States v. Haas*, 163 Fed. 908.

§ 1016. ¹ *Pettibone v. United States*, 148 U. S. 197, 37 L. ed. 419, 13 S. C. 542.

§ 1017. ¹ *Toledo, Ann Arbor & North Michigan Railway Co. v. Pennsylvania Co.*, 54 Fed. 730; *Waterhouse v. Comer*, 55 Fed. 149.

§ 1018. ¹ *Cohen v. United States*, 157 Fed. 651, 85 C. C. A. 113 (2d Cir.); *Kaufman v. United States*, 212 Fed. 613, 617, 129 C. C. A. 149 (2d Cir.); and see *Bankruptcy Offenses*.

§ 1019. ¹ *Hyde v. United States*, 225 U. S. 347, 356, 56 L. ed. 1114, 32 S. C. 793; *Hyde v. Shine*, 199 U. S. 62, 76, 50 L. ed. 90, 25 S. C. 760; *Brown v. Elliott*, 225 U. S. 392, 400, 56 L. ed. 1136, 32 S. C. 812;

Joplin Mercantile Co. v. United States, 236 U. S. 531, 535, 59 L. ed. 705, 35 S. C. 291; *United States v. Rabinowich*, 238 U. S. 78, 86, 59 L. ed. 1211, 35 S. C. 682; *Easterday v. McCarthy*, 256 Fed. 651, — C. C. A. — (2d Cir.); *Shea v. United States*, 236 Fed. 97, 101, 149 C. C. A. 307 (6th Cir.); *Salas v. United States*, 234 Fed. 842, 148 C. C. A. 440 (2d Cir.); *Bernstein v. United States*, 238 Fed. 923, 151 C. C. A. 657 (4th Cir.); *United States v. Linton*, 223 Fed. 677; *Tillinghast v. Richards*, 225 Fed. 226; *Dealy v. United States*, 152 U. S. 539, 38 L. ed. 545, 14 S. C. 680; *United States v. Campbell*, 179 Fed. 762; *Robinson v. United States*, 172 Fed. 105, 96 C. C. A. 307 (8th Cir.); *Arnold v. Weil*, 157 Fed. 429.

crime is complete and the subsequent overt act in pursuance thereof may be done anywhere.² Conversely, if the overt act was committed within the judicial district charged in the indictment, it is immaterial where the alleged conspiracy was formed, or whether or not the parties thereto, or either of them, were ever seen within such district.³ If the indictment sufficiently charges the commission of overt acts within the district, it is sufficient even if it states that the place where the conspiracy was formed is unknown.⁴

§ 1020. Origin and History of the Crime of Conspiracy.

According to Bracton, there were two methods of commencing proceedings for felonies. One was by appeal,¹ which was guarded against abuse by the liabilities imposed upon the appellor, and these were both personal and pecuniary. The other was that the grand jurors who were charged with the duty of making presentments or finding indictments should inquire into suggestions of felony reaching them "*per famam patriæ*," that is to say, either of their own knowledge or by several persons coming to inform them, informally, that a specified person had committed a crime. The grand jurors were thereupon sworn to inquire into the truth of this information; if the informers proved trustworthy an indictment was found. In the time of Edward I, it was found that these forms of procedure were inconvenient in three particulars. First, it was discovered that appeals were brought by persons who were unable to pay damages found

² Dealy v. United States, 152 U. S. 539, 38 L. ed. 545, 14 S. C. 680.

³ United States v. Newton, 52 Fed. 275.

⁴ Brown v. Elliott, 225 U. S. 392, 56 L. ed. 1136, 32 S. C. 812.

§ 1020. ¹ The appeal, in criminal practice, was a formal accusation made by one private person against another of having committed some heinous crime. 4 Blackst. Com. 312. In the twelfth and thirteenth centuries and for some time thereafter the crown relied as much upon the appeal of the private accuser as

upon the presentment of a jury. II Holdsworth, History of English Law, 155. It latterly decayed as a mode of criminal procedure, giving way to the indictment, and it was not allowed to be used in any but serious criminal cases. The facts must disclose the commission of a felony. *Ib.* 201. It lived long in the law because it had been forgotten. The appeal of murder had the longest history. All appeals in criminal cases were finally abolished by statute. 59 Geo. III. c. 46, in 1819. *Ib.* 306, 307; I Stephens, Crim. Law of England, 250.

against them. Then it was found that children under twelve years of age, who by the law could not be outlawed, were incited to bring appeals. Lastly, there was no remedy against those who brought the grand jurors a false *fama patriæ*. The first of these inconveniences was dealt with by 13 Edw. I, c. 12. The third was partly remedied by the first Ordinance of Conspirators (20 Edw. I), by the second Ordinance of Conspirators (28 Edw. I, c. 10), and the third Ordinance of Conspirators (33 Edw. I). The third Ordinance also dealt with the second difficulty. The remedy under 20 Edw. I, however, was only by writ out of chancery, though on that imprisonment might be awarded; the remedy under 28 Edw. I was by inquest without writ. It remained for 4 Edw. III, c. 11, to make conspiracy effectively criminal, by directing the justices of either bench or assize in sessions to hear and determine conspiracies and maintenances. Briefly, it would appear that the remedy of conspiracy was required only where there was no other remedy or guaranty of truth, and where the defendants had volunteered their information. Successive statutes applied the remedy as experience proved its necessity. Pollock & Maitland in their "History of English Law before the Time of Edward I", in treating of the subject of the punishment for wrongful prosecution, say, "A few years later (than Stat. West. II, 13 Edw. I, c. 12, 1284) it was necessary to invent the writ of conspiracy for use against those who were abusing the new process of indictment."² In a footnote to this statement, the authors say: "Coke, II. Inst. 383-4, 562, says that before the Edwardian Statutes the appellee had an action for damages and the writ of conspiracy was already in existence. He relies, however, upon the fables in the Mirror." In another footnote elsewhere in the book, Vol. II, page 476, they say of the Mirror of Justices that its account of criminal law is so full of fables and falsehoods that as an authority it is worthless. In *Articuli super Chartas*, 28 Edw. I, c. 10, inquests without writ were provided for in cases of conspiracy. Coke, in a note thereon, II. Inst. 562, says: "This ordinance was but in affirmance of the common law; for the writ of conspiracy was maintainable both in cases criminal concerning life, and civil, as it appeareth in the

² Volume II, p. 538.

Register and F. N. B. [Fitzherbert's "Natura Brevium"] and plentifully in our books; and in cases concerning life, if the conspirators be indicted and convicted at the king's suit, judgment villanous will be given against him, but not at the suit of the party, which judgment is by the common law; for it is given by no statute." It is true that, as Pollock & Maitland say, even before Stat. West. II, c. 12, an acquitted appellee may have had an action against his accuser, but that is different from saying that he might have had a writ of conspiracy. Conspiracy has much analogy to an attempt to commit a crime. It consists in an agreement between two or more persons (as is commonly said) "to do an unlawful act or to do a lawful act by unlawful means." In other words, it is an agreement to do anything unlawful, whether the thing agreed upon is in itself an ultimate object, or only a means to an end lawful or unlawful.

§ 1021. Early Uses and Definitions of Conspiracy.

The crime of conspiracy regarded as an inchoate offense calls for little observation, but it has a remarkable history. In very early times the word had a completely different meaning from that which we attach to it. This appears from two early statutes. The first is the *Articuli super Chartas* (28 Edw. I, A.D. 1300), which was intended to supplement and enforce Magna Charta. The tenth chapter begins: "In right of conspirators, false informers, and evil procurers of dozens, assizes, inquests, and juries, the king has provided remedy for the plaintiffs by a writ out of chancery. And notwithstanding he willeth that his justices of the one bench and of the other, and justices assigned to take assizes, when they come into the country to do their office shall upon every plaint made unto them award inquests thereupon without writ, and shall do right unto the plaintiffs without delay." In the 33 Edw. I (1304) there is a definition of conspirators. "Conspirators be they who do confeder or bind themselves by oath, covenant, or other alliance, that every of them shall aid and bear the other falsely and maliciously to indict or cause to indict, or falsely to move or maintain pleas; and also such as cause children within age to appeal men of felony whereby they are imprisoned and sore grieved; and such as retain men in the country with liveries or

fees to maintain their malicious enterprises; and this extendeth as well to the takers as to the givers; and stewards and bailiffs of great lords which by their seignory office or power undertake to bear and maintain quarrels, pleas, or debates that concern other parties than such as touch the estates of their lords or themselves." The earliest meaning of conspiracy was thus a combination to carry on legal proceedings in a vexatious or improper way, and the writ of conspiracy, and the power given by the *Articuli super Chartas* to proceed without such a writ were the forerunners of our modern actions for malicious prosecution. Originally, therefore, conspiracy was rather a particular kind of civil injury than a substantive crime, but like many other civil injuries it was also punishable on indictment, at the suit of the king, and upon a conviction the offender was liable to an extremely severe punishment which was called "the villain judgment." The Star Chamber first treated conspiracies to commit crimes or indeed to do anything unlawful as substantive offenses, and after the Restoration this amongst other doctrines of theirs found its way into the Court of King's Bench. The doctrine was expressed so widely or loosely that it became in course of time a head of law of great importance, and capable of almost indefinite extension. In various cases the definition that a conspiracy is an agreement to do an unlawful act was held to mean something more than an agreement to do an act which is in itself criminal when done by a single person, the word "unlawful" being used in a sense closely approaching to immoral simply, and amounting at least to immoral and at the same time injurious to the public. The length to which this doctrine has been carried even in our own days with respect especially to conspiracies in restraint of trade, and conspiracies to compel employers of labor to submit to terms imposed upon them by persons in their employment is well known.¹ The doctrine that it is a crime for two or more to combine to commit some act, though the purpose of the agreement is not carried out, "put in ure", in the words of the oldest known case on the subject, seems to have originated in the Anglo-Saxon jurisprudence. There appears to be nothing to show that it had its

§ 1021. ¹ 2 Stephen's Criminal Law of England, 227.

origin in the Norman laws, from whence it would naturally be supposed to be derived. There seems to be no mention of conspiracy in the cases in "Placita Anglo-Normanica" (1066-1195), Select Pleas of the Crown (1200-1225), the cases in Bracton's Note Book (1200-1240), in Glanville (*circa* 1189), Bracton's treatise (*circa* 1250), Britton or Fleta (*circa* 1290). This fact alone might raise a strong presumption that no such offense existed at common law, and that some change in the judicial system of the country gave rise to the abuses which statutes were from time to time passed to remedy. The first extant reported case in which a conviction was obtained for criminal conspiracy is to be found in the Articles of Inquest (1354), as follows: "Note: that two were indicted of conspiracy, each to maintain the other, whether their matter was true or false, and notwithstanding that nothing was put in ure, the parties were held to answer, because this thing is forbidden by the law (*defendu en ley, i.e., criminal*)." For over one hundred years Edward II, Edward III, and Richard II, repeatedly passed statutes against the crimes of champerty, embracery, maintenance and conspiracy, all of them crimes having the one common criminal object, the perversion of justice. Even Coke does not go any further than to say (3 Inst. 143) that a conspiracy is an agreement falsely to appeal a man convicted of a felony; nor do Blackstone, Fitzherbert ("Natura Brevium"), Rolle (Abr.), or Staundford ("Pleas of the Crown"). None of these last mentioned text writers gives any hint of the existence of conspiracies outside of the statutes. Coke's credulity and carelessness of statement has been commented on by some of the best modern authorities on English law, as well as his reliance on the now generally discredited Mirror. The statute of 33 Edw. I gives what it calls a "*finalis definitio*" or "final definition" of conspirators. It is clear that the word "final" here has the meaning of "finite" or limiting with reference to boundaries and not to an ultimate point of time. The latter construction would be absurd. If this is so, it is plain there could have been nothing left outside of the statute touching the same subject-matter, viz. conspiracy. Hudson, in his treatise on the Star Chamber (2 Coll. Jurid. 104), says, regarding the crime of conspiracy: "I will conclude the

particular offense which I shall speak of with this great offense of conspiracy rarely heard of in former times, but in our age grown frequent and familiar. And herein some questions have arisen; as in the case between Rochester and Tolm it was questioned whether if the party is *legitimo modo acquietatus*, he may sue in this court for conspiracy, for Sir Edward Coke would have maintained that after his acquittal he was to prefer his indictment at the common law, where conspirators were to have their villainies judged. But the Lord Egerton did gravely confute that opinion and open the jurisdiction of this court, manifesting that notwithstanding the party might have his indictment, yet that excludeth not the court of jurisdiction; for in all cases of force and fraud an indictment lieth at the common law; yet this court will proceed for the king also. . . . But when the party is indicted, and not *legitimo modo acquietatus*, then can no conspiracy lie, as it was adjudged in Daniel Wright's case." This treatise was written about 1625, and is ranked by modern text writers (including Sir James Fitzjames Stephen) as an authority.

§ 1022. Conspiracy in the Federal Statutes.

Section 5440 of the Revised Statutes of the United States originated as Section 30 of an act entitled "An Act to amend existing laws relating to internal revenue and for other purposes", approved March 2, 1867 (14 Stat. 471, 484, c. 169). Under authority of an act approved June 27, 1866 (14 Stat. 74, c. 140), a commission was appointed to revise and consolidate the statute laws of the United States, and empowered to "make such alterations as may be necessary to reconcile the contradictions, supply the omissions, and imperfections of the original text." That commission was not authorized to make any changes in the law as it stood, but only to alter the existing text so far as necessary to make clear the intention of Congress whenever that intention was found obscured by contradictions, imperfections or omissions. The commission reported in 1873, taking the conspiracy provision out of the special class of revenue legislation, and placing it under a heading, "Crimes against the Operations of the Government", as an independent section (5440) of the Revision. It changed the text so that, instead of reading "or to defraud the United

States in any manner whatsoever", it read "or to defraud the United States in any manner or for any purpose, etc." By an act approved May 17, 1879 (21 Stat. 4, c. 8), Section 5440 was amended so as to provide for a fine of not more than \$10,000 or imprisonment for not more than two years or both, in the discretion of the court, in lieu of the cumulative punishment provided for in the original section.¹ Section 37 first appeared as § 30 of "An Act to Amend Existing Law Relating to Internal Revenue, and for Other Purposes", enacted on March 2, 1867 (14 Stat. 471, c. 169), and, except for an omitted not relevant provision, the section has continued from that time to this, in almost precisely its present form. It was carried into the Revision of the United States Statutes of 1873-1874 as § 5440 of Chapter 5, the title of which is "Crimes against Operations of the Government", while another chapter, Chapter 7 of the revision, deals with "Crimes against the Elective Franchise and Civil Rights of Citizens." Forty-two years after its first enactment the section was carried into the Criminal Code (in force on and after January 1st, 1910), where it now appears as § 37, again in a chapter, now Chapter 4, devoted to "Offenses against the Operations of the Government", while Chapter 3 of the Code deals with "Offenses against the Elective Franchise and Civil Rights of Citizens."

§ 1023. Application of the Conspiracy Statute.

The section has been widely applied in the prosecution of frauds upon the revenue, in land cases, and to other operations of the government, and while no inference or presumption of legislative construction is to be drawn from the chapter headings under which it is found in the Criminal Code (§ 339), nevertheless the history of the origin, classification, and use made of the section, which we have just detailed, are not without significance, and taken with the fact that confessedly this is the first time that it has been attempted to extend its application to the conduct of elections, they suggest strongly that it was not intended by Congress for such a purpose.¹

§ 1022. ¹ *Thomas v. United States*, 156 Fed. 897, 899, 84 C. C. A. 477 (8th Cir.).

§ 1023. ¹ *United States v. Gradwell*, 243 U. S. 476, 481, 61 L. ed. 857, 862, 37 S. C. 407.

§ 1024. Definition.

In *Reg. v. Parnell*,¹ Lord Fitzgerald said: "It is a criminal act, where two or more agree to have a crime committed; where two or more agree to effectuate their object by unlawful means, or where two or more agree to do an injury to a third party or to a class, though that injury, if done by any one alone of his own motive, would not be in him a crime or an offense, but would simply be an injury carrying with it a right to civil remedy."

§ 1025. Extent of Crime of Conspiracy. English Doctrine. Use and Application.

In *Regina v. Boulton*,¹ Lord Chief Justice Cockburn said, with regard to the general nature of the indictment for conspiracy, and the mode in which it had been attempted to support it: "The case is one which requires the utmost discrimination and care, not only on account of the interests of the accused but of the interests of public justice, and especially with reference to the form in which it is presented to you. We are trying the defendants for conspiring to commit a felonious crime, and the proof of it, if it amounts to anything, amounts to proof of the actual commission of crime. Now I must say that this is not a course which commends itself to my approval. I am clearly of opinion that where the proof intended to be submitted to a jury is proof of the actual commission of crime, it is not the proper course to charge the parties with conspiring to commit it; for that course operates, it is manifest, unfairly and unjustly against the parties accused; the prosecutors are thus enabled to combine in one indictment a variety of offenses, which, if treated individually, as they ought to be, would exclude the possibility of giving evidence against one defendant to the prejudice of others, and deprive defendants of the advantage of calling their co-defendants as witnesses. I do not say this merely on my own authority. I have the authority of the late Lord Cranworth — one of the ablest of our judges — for the view I have expressed. In a case before him, in which the parties had been indicted, not for the offense they had committed,

§ 1024. ¹ (1881) 14 Cox (C. C.), 508, 513.

§ 1025. ¹ (1871) 12 Cox (C. C.), 87, 93.

but for conspiracy to commit it, that eminent judge said that such a course was no doubt legal, but that it would have been more satisfactory if they had been indicted for that which they had done, and not for conspiring to do it. I entirely adopt that view, and think that it would have been far better if these parties who were brought before you on one common indictment, for offenses essentially several and distinct, had been respectively indicted and put upon their defense for the offenses they had respectively committed." The case to which Lord Cockburn referred is *Regina v. Selsby* (1847), a case of conspiracy to raise wages, a report of which is appended to that of *Regina v. Rowlands*.² Lord Cranworth said, page 497: "But if any illegal means be taken, the principle of the common law steps in and says that if any persons conspire and combine together to effect this illegal object, an object that is of itself illegal, any such conspiracy to effect the illegal object is itself criminal; and what the prosecutors of this indictment have done is this, they have not proceeded under the statute to indict the parties for the alleged illegal act, but they undertake to show that there was a general combination amongst them all to effect these illegal acts, and for that it is they have indicted them. That is a legal course to pursue, and being legal I shall not now step out of the path of my duty by speculating upon the policy that has been adopted in this case. It would be, however, much more satisfactory to my mind if parties were indicted for that which they have directly done, and not for having previously conspired to do something, the having done which is the proof of the conspiracy. It never is satisfactory, although undoubtedly it is legal." Unfortunately, the salutary rule above laid down is not observed in this country. It was held that it may be that there has been an abuse of indictment for conspiring instead of for the substantive crime itself, but that the liability for conspiracy was not taken away by its success,³ although in *United States v. Kissel*,⁴ the Court passed critical remarks on the tendency in recent years for public prosecutors to indict for conspiracies when crimes have been con-

² 5 Cox (C. C.), 466, 497.

Brown v. Elliott, 225 U. S. 392, 56

³ *Heike v. United States*, 227 U. S. 131, 57 L. ed. 450, 33 S. C. 226;

L. ed. 1136, 32 S. C. 812.

⁴ 173 Fed. 823, 828.

summated. This decision has, however, been reversed.⁵ And in another case it was contended that when the Government has proof tending to show that the defendants have committed a substantive offense by violating some provision of a statute, it is not fair to indict and try for a conspiracy to commit that offense. In reply to this contention the court said that the argument is one to be addressed to Congress and not to the Courts. Congress made the conspiracy itself a distinct offense, with a penalty differing from, and frequently more severe than, that imposed for the commission of the act which defendants conspired to commit.⁶

§ 1026. Two Offenses.

A conspiracy to commit a crime is a different offense from the crime that is the object of the conspiracy, and is punishable though the intended crime be accomplished.¹ It does not make any difference that Congress has seen fit to affix a greater punishment to the conspiracy than is denounced against the offense itself; that is a matter to be determined by the legislative body having power to regulate the matter.² Whatever may be thought of the wisdom or propriety of a statute making a conspiracy to do an act punishable more severely than the doing of the act itself,

⁵ *United States v. Kissel*, 218 U. S. 601, 54 L. ed. 1168, 31 S. C. 124.

⁶ *Mitchell v. United States*, 229 Fed. 357, 362, 143 C. C. A. 477 (2d Cir.).

§ 1026. ¹ *Mitchell v. United States*, 229 Fed. 357, 143 C. C. A. 477 (2d Cir.); *United States v. Rabinowich*, 238 U. S. 78, 59 L. ed. 1211, 35 S. C. 682; *Callan v. Wilson*, 127 U. S. 540, 555, 32 L. ed. 223, 8 S. C. 1301; *Clune v. United States*, 159 U. S. 590, 595, 40 L. ed. 269, 16 S. C. 125; *Williamson v. United States*, 207 U. S. 425, 447, 52 L. ed. 278, 28 S. C. 163; *United States v. Stevenson* (No. 2), 215 U. S. 200, 203, 54 L. ed. 157, 30 S. C. 37; *McKelvey v. United States*, 241 Fed.

801, 154 C. C. A. 503 (9th Cir.); *United States v. Thomas*, 145 Fed. 74; *Heike v. United States*, 227 U. S. 131, 144, 57 L. ed. 450, 33 S. C. 226; *United States v. Downey*, 257 Fed. 364; *Kelly v. United States*, 258 Fed. 392, — C. C. A. — (6th Cir.); *McKnight v. United States*, 252 Fed. 687, 164 C. C. A. 527 (8th Cir.); *Robinson v. United States*, 172 Fed. 105, 96 C. C. A. 307 (8th Cir.); *Scott v. United States*, 165 Fed. 172, 91 C. C. A. 206 (5th Cir.); *United States v. Rogers*, 226 Fed. 512.

² *United States v. Stevenson* (No. 2), 215 U. S. 200, 54 L. ed. 157, 30 S. C. 37; *Thomas v. United States*, 156 Fed. 897, 84 C. C. A. 477 (8th Cir.).

it is a matter to be considered solely by the legislative body. The power exists to separate the conspiracy from the act itself and to affix distinct and independent penalties to each.³

§ 1027. Merger of Offenses.

The conspiracy is not merged in the completed offense because it happens that the two offenses are of the same grade and the punishment is substantially the same.¹ The crime of conspiracy, not being declared a felony, is merely a misdemeanor, and is not merged with the object of the conspiracy, that being also a misdemeanor.²

§ 1028. Reason for the Harshness of the Rule in Conspiracy.

For two or more to confederate and combine together to commit or cause to be committed a breach of the criminal laws is an offense of the gravest character, sometimes quite outweighing, in injury to the public, the mere commission of the contemplated crime. It involves deliberate plotting to subvert the laws, educating and preparing the conspirators for further and habitual criminal practices. And it is characterized by secrecy, rendering it difficult of detection, requiring more time for its discovery, and adding to the importance of punishing it when discovered.¹

§ 1029. Definitions and Elements of Criminal Conspiracy.

The only crimes punishable under Federal law are those defined by the laws enacted by Congress. The elements of the crime of conspiracy under the laws of the United States are: (1) An object to be accomplished, which must be (a) the commission of an offense against the United States; (b) to defraud the United States. (2) A plan or scheme embodying means to accomplish the object. (3) An agreement or understanding between two or more persons whereby they become definitely committed to coöperate for the accomplishment of the object by the means embodied in the scheme, or by an effectual means. (4) An overt act by one or

³ *Clune v. United States*, 159 U. S. 590, 595, 40 L. ed. 269, 16 S. C. 125; *Callan v. Wilson*, 127 U. S. 540, 555, 32 L. ed. 223, 8 S. C. 1301.

§ 1027. ¹ *United States v. Scott*, 139 Fed. 697.

² *Berkowitz v. United States*, 93 Fed. 452, 35 C. C. A. 379 (3d Cir.).

§ 1028. ¹ *United States v. Rabino- wick*, 238 U. S. 78, 59 L. ed. 1211, 35 S. C. 682.

more of the conspirators to effect the object of the conspiracy.¹ Lord Denman's antithesis that a criminal conspiracy consisted in the combination for accomplishing an unlawful end or a lawful end by unlawful means² was not intended by him as a definition of what combinations are criminal.³ It is neither criminal nor unlawful to do or to conspire to do that which the law does not prohibit, but recognizes it may be lawfully done without prejudice or injury to the United States or the State.⁴

§ 1030. Character of Agreement.

It is sufficient that the minds of the parties met understandingly so as to bring about an intelligent and deliberate agreement to do the acts and to commit the offense charged.¹ Where a thing is not an offense at all, a party cannot be guilty of committing an offense by merely consenting thereto; and even where the thing is an offense, a party can be guilty of committing an offense by consenting thereto only where his consent is of that affirmative and expressed character which amounts to counseling, aiding or abetting in the commission of the offense.² Of course,

§ 1029. ¹ *United States v. Mun-day*, 186 Fed. 375, 377; *United States v. Adler*, 49 Fed. 736; *United States v. Benson*, 70 Fed. 591, 595, 17 C. C. A. 293 (9th Cir.); *United States v. Thompson*, 29 Fed. 86; *United States v. Wootten*, 29 Fed. 702; *United States v. Babcock*, 3 Dill. 581, Fed. Cas. No. 14487; *United States v. Nunnemacher*, 7 Biss. 111, Fed. Cas. No. 15902; *United States v. Sacia*, 2 Fed. 754; *United States v. Cassidy*, 67 Fed. 698; *Pettibone v. United States*, 148 U. S. 197, 37 L. ed. 419, 13 S. C. 542; *Mitchell v. Hitchman Coal & Coke Co.*, 214 Fed. 685, 708, 131 C. C. A. 425 (4th Cir.); *United States v. Cole*, 153 Fed. 801; *United States v. Moore*, 173 Fed. 122; *United States v. Raley*, 173 Fed. 159; *United States v. Stevenson*, 215 U. S. 200, 54 L. ed. 157, 30 S. C. 37.

² *Rex v. Jones*, 4 Barn. & Ad. 345.

³ *Reg. v. Peck*, 9 Ad. & El. 686, approved in *United States v. Biggs*, 211 U. S. 507, 53 L. ed. 305, 307, 29 S. C. 181.

⁴ *Fain v. United States*, 209 Fed. 525, 126 C. C. A. 347 (8th Cir.); *United States v. Biggs*, 211 U. S. 507, 521, 53 L. ed. 305, 29 S. C. 181.

§ 1030. ¹ *Alaska Steamship v. International Longshoremen's Ass'n*, 236 Fed. 964; *Marrash v. United States*, 168 Fed. 225, 93 C. C. A. 511 (2d Cir.); *In re Friedman*, 164 Fed. 131; *United States v. Cole*, 153 Fed. 801; *Chadwick v. United States*, 141 Fed. 225, 72 C. C. A. 343 (6th Cir.); *Davis v. United States*, 107 Fed. 753, 46 C. C. A. 619 (6th Cir.).

² *Woo Wai v. United States*, 223 Fed. 412, 137 C. C. A. 604 (9th Cir.), approving *State v. Douglas*, 44 Kans. 618, 625, 26 Pac. 476, 478.

a mere discussion between parties about entering into a conspiracy, or as to the means to be adopted for the performance of an unlawful act, does not constitute a conspiracy unless the scheme, or some proposed scheme, is in fact assented to or concurred in by the parties in some manner so that their minds meet for the accomplishment of the proposed unlawful act.³ The mere knowledge, acquiescence or approval of the act, without coöperation or *agreement* to coöperate, is not enough to constitute one a party to a conspiracy.⁴ Knowledge by an alleged co-conspirator that the other defendants were attempting to defraud is not enough to involve him in it; nor is mere suspicion that he was a party to the conspiracy.⁵ Mere suspicion or bare knowledge by an alleged co-conspirator that the defendant was attempting to defraud the United States is not sufficient to make such person a party to the attempt to defraud, and to sustain the charge of conspiracy. To constitute a conspiracy the evidence must also show intentional participation in the attempt to defraud.⁶ It is not necessary that the conspiracy should originate with the persons charged.⁷ Evidence that each of several defendants acted illegally or maliciously with the same end in view will not support a charge of conspiracy, unless it appears that such acts were done pursuant to mutual agreement.⁸ If no violation of the law is to be accomplished by the act of the defendants, they cannot be held for conspiracy to do that act.⁹ A conspiracy to defraud an

³ *United States v. Cole*, 153 Fed. 801, 803; *United States v. Goldberg*, 7 Biss. 175, Fed. Cas. No. 15223.

⁴ *Patterson v. United States*, 222 Fed. 599, 138 C. C. A. 123 (6th Cir.); *Certiorari denied*, 238 U. S. 635, 59 L. ed. 1499, 35 S. C. 939; *Mar-rash v. United States*, 168 Fed. 225, 93 C. C. A. 511 (2d Cir.); *United States v. Newton*, 52 Fed. 275; *United States v. Nunnemacher*, 7 Biss. 111, Fed. Cas. No. 15902; *Ford v. United States*, 12 Ariz. 23, 94 Pac. 1102.

⁵ *Marrash v. United States*, 168 Fed. 225, 231, 93 C. C. A. 511 (2d Cir.); *United States v. Newton*, 52 Fed. 275.

⁶ *United States v. Newton*, 52 Fed. 275.

⁷ *United States v. Sacia*, 2 Fed. 754.

⁸ *Newall v. Jenkins*, 26 Pa. 159; *Rex v. Pywell*, 1 Stark. 402, holding that although it be proven that several individuals falsely induced the owner of a horse to believe that it was unsound, there can be no conviction of conspiracy unless a combination between the parties for the purpose of effecting the fraud is proved.

⁹ *Woo Wai v. United States*, 223 Fed. 412, 137 C. C. A. 604 (9th Cir.).

individual, even though the mails be made use of for that purpose, was held not to fall within the terms of the statute.¹⁰ Mere presence on the occasion of the conspiracy is not sufficient to make one guilty. The person charged must incite, procure, or encourage the act; but if a person joins the conspiracy at any time after it is formed, he becomes a conspirator, and the acts of the others become his by adoption.¹¹ But a person who was not a party to the conspiracy cannot be convicted on the overt act.¹² One person may be convicted of conspiracy although the other conspirator is not on trial.¹³ It is no defense that the accused acted in his professional capacity as an attorney.¹⁴

§ 1031. Entrapping Persons to Violate the Law.

It is unlawful for a public official or any person to induce a man to commit a crime in order to get a conviction. The courts will not lend aid or encouragement to officers who may, even under a mistaken sense of duty, encourage and assist parties to commit crime, in order that they may arrest and have them punished for so doing. Accordingly, where the scheme does not originate with the defendant and he is lured into the conspiracy by an officer of the law, he cannot be held for the offense, for in contemplation of law, no crime has in fact been committed.¹

§ 1032. Who May Be Guilty.

A corporation may be indicted and convicted under Section 37 for conspiracy to commit an offense against the United States by carrying liquor into Indian Territory and introducing it into the Indian country, although under Section 335 the offense is a felony.¹ A woman transported in violation of the White Slave Act of 1910 may be guilty of conspiracy under Section 37, since she may suggest and carry out the details of the journey.² If defendants

¹⁰ *United States v. Clark*, 121 Fed. 190.

¹¹ *United States v. Johnson*, et al., 26 Fed. 682.

¹² *United States v. Cole*, 153 Fed. 801.

¹³ *United States v. Breese*, 173 Fed. 402.

¹⁴ *Baird v. United States*, 196 Fed. 778, 116 C. C. A. 73 (8th Cir.).

§ 1031. ¹ *Woo Wai v. United States*, 223 Fed. 412, 137 C. C. A. 604 (9th Cir.); *United States v. Lynch*, 256 Fed. 983.

§ 1032. ¹ *Joplin Mercantile Co. v. United States*, 213 Fed. 926, 131 C. C. A. 160 (8th Cir.).

² *United States v. Holte*, 236 U. S. 140, 59 L. ed. 504, 35 S. C. 271.

have conspired to get the moneys of a bank and have committed an overt act in furtherance of such conspiracy, they would be guilty even if they believed the moneys actually received by them were those of a clerk in the bank.³ It is a well-settled proposition that persons other than a bankrupt may commit an offense by conspiring with him that he shall conceal his goods.⁴ In *Johnson v. United States*,⁵ it was held that an averment of conspiracy to conceal assets from a bankrupt's trustee will not lie where the trustee himself is charged as one of the conspirators. And in another case⁶ it was held that an indictment for conspiracy to conceal property from a trustee in bankruptcy was bad for failure to use the statutory words "knowingly" and "fraudulently." Persons conspiring with a bankrupt to commit an offense against the Bankruptcy Act may be guilty of conspiracy though they are not bankrupts; therefore, the fact would not make an indictment including them insufficient.⁷ Individuals may be guilty of conspiracy including in its purpose the fraudulent concealment of the assets of a bankrupt corporation, even if the corporation may not be charged as a conspirator.⁸ If a conspiracy contemplated false, fictitious, or fraudulent homestead entries, a party to it is chargeable with the acts consummating it, though not personally cognizant with the details. Indeed, he might be guilty, though no entries were made at all.⁹ One who comes into a conspiracy after it was concocted with full knowledge of its existence and character and with a purpose of furthering its designs is as much a conspirator as if he participated in its original formation.¹⁰

³ *Oppenheim v. United States*, 241 Fed. 625, 154 C. C. A. 383 (2d Cir.).

⁴ *Meyer v. United States*, 220 Fed. 822, 135 C. C. A. 564 (5th Cir.); *Tapack v. United States*, 220 Fed. 445, 135 C. C. A. 39 (3d Cir.); *Cohen v. United States*, 157 Fed. 651, 85 C. C. A. 113 (2d Cir.); *Nemcof v. United States*, 202 Fed. 911, 121 C. C. A. 269 (3d Cir.); *United States v. Holte*, 236 U. S. 140, 59 L. ed. 504, 35 S. C. 271.

⁵ 158 Fed. 69, 85 C. C. A. 399 (5th Cir.).

⁶ *United States v. Comstock*, 162 Fed. 415.

⁷ *United States v. Rhodes*, 212 Fed. 513.

⁸ *Roukous v. United States*, 195 Fed. 353, 115 C. C. A. 255 (1st Cir.); *Cohen v. United States*, 157 Fed. 651, 85 C. C. A. 113 (2d Cir.).

⁹ *Richards v. United States*, 175 Fed. 911, 99 C. C. A. 401 (8th Cir.).

¹⁰ *Thomas v. United States*, 156 Fed. 897, 912, 84 C. C. A. 477 (8th Cir.); *United States v. Newton*, 52 Fed. 275, 280; *United States v.*

§ 1033. Verdict.

As at least two persons are necessary to a conspiracy, if two or more are tried and all but one are acquitted, such one must also be acquitted.¹ On a trial for combining, conspiring, etc., to commit an offense against the United States, a verdict of "Guilty of conspiracy" was a general, and not a special verdict, and to be understood as referring to the conspiracy charged in the indictment, and sufficient.² Three persons were indicted for conspiracy to defraud the United States of important duties on three counts, all relating to the same transaction and stating the same facts in different terms. After each count the same fifty overt acts were scheduled and alleged. The jury found one defendant "not guilty", another "guilty of overt act No. 21 only", and another "guilty of overt act No. 46 only." It was held that the verdict was not fatally defective, as against the contention that it was, in effect, a verdict of not guilty on all the counts.³

§ 1034. Power of Congress to Punish for Conspiracy.

The weight of authority is to the effect that the legislature has the power to enact statutes imposing a heavier punishment for conspiracy than for the offense which is its object,¹ though there are some state decisions holding that conspiracy to commit an offense should never be punished more severely than the offense itself.²

§ 1035. Overt Acts — Abandonment of Evil Design.

At common law no overt act was requisite, but the mere formation of such a conspiracy by two or more persons was criminal and indictable. The offense was then complete and ended.¹

Barrett, 65 Fed. 62; United States v. Cassidy, 67 Fed. 698.

§ 1033. ¹ United States v. Hamilton, Fed. Cas. No. 15288; United States v. Morris, Fed. Cas. No. 15812.

² Huff v. United States, 228 Fed. 892, 143 C. C. A. 290 (5th Cir.).

³ Drew v. United States, 192 Fed. 854, 113 C. C. A. 178 (2d Cir.).

§ 1034. ¹ Clune v. United States, 159 U. S. 590, 40 L. ed. 269, 16 S. C. 125; United States v. Stevenson

(No. 2.), 215 U. S. 200, 54 L. ed. 157, 30 S. C. 37; Thomas v. United States, 156 Fed. 897, 84 C. C. A. 477 (8th Cir.).

² Williams v. Commonwealth, 34 Pa. 178; Hartmann v. Commonwealth, 5 Pa. 60.

§ 1035. ¹ Rex v. Gill, 2 Barn. & Ald. 204; Rex v. Hamilton, 7 Car. & P. 448; United States v. Walsh, 5 Dill. 58, Fed. Cas. No. 16638.

However, by the provisions of the statute, the conspiracy there denounced is not effective until an overt act is committed by one or more of the conspirators. The United States Supreme Court holds² that the provisions of the statute that there must be an act done to effect the object of the conspiracy affords a *locus penitentie*, so that before the act is done either one or all of the parties may abandon their design and thus avoid the penalty prescribed by the statute.³ A mere conspiracy without an overt act done in pursuance of it is not criminally punishable under Section 37,⁴ and it is well settled that an overt act must be alleged and proved.⁵ If such were not the law, indictments for conspiracy would stand

² *United States v. Britton*, 108 U. S. 199, 27 L. ed. 698, 2 S. C. 531; *Dealy v. United States*, 152 U. S. 539, 546, 38 L. ed. 545, 14 S. C. 680; *Hyde v. United States*, 225 U. S. 347, 56 L. ed. 1114, 32 S. C. 793; *Hyde v. Shine*, 199 U. S. 62, 50 L. ed. 90, 25 S. C. 766; *Ex parte Black*, 147 Fed. 832, *affirmed in* 160 Fed. 431; *Dimond v. Shine*, 199 U. S. 88, 50 L. ed. 99.

³ *United States v. Britton*, 108 U. S. 199, 27 L. ed. 698, 2 S. C. 531.

⁴ *United States v. Rabinowich*, 238 U. S. 78, 59 L. ed. 1211, 35 S. C. 682; *Hyde & Schneider v. United States*, 225 U. S. 347, 359, 56 L. ed. 1114, 32 S. C. 793; *Hyde v. Shine*, 199 U. S. 62, 76, 50 L. ed. 90, 25 S. C. 760; *United States v. Hirsch*, 100 U. S. 33, 34, 25 L. ed. 539; *United States v. Baker*, 243 Fed. 741; *United States v. Linton*, 223 Fed. 677; *United States v. Bopp*, 237 Fed. 283; *Shea v. United States*, 236 Fed. 97, 149 C. C. A. 307 (6th Cir.).

⁵ *McGinniss v. United States*, 256 Fed. 621, — C. C. A. — (2d Cir.); *United States v. Patten*, 187 Fed. 664; *Houston v. United States*, 217 Fed. 852, 133 C. C. A. 562 (9th Cir.); *United States v. Norris*, 255 Fed. 423; *Nash v. United States*, 229 U. S. 373, 57 L. ed. 1232, 33 S. C. 780; *Bannon & Mulkey v. United*

States, 156 U. S. 464, 39 L. 494, 15 S. C. 467; *United States v. Britton*, 108 U. S. 199, 204, 27 L. ed. 698, 2 S. C. 531; *Hyde & Schneider v. United States*, 225 U. S. 347, 56 L. ed. 1114, 32 S. C. 793; *United States v. Patterson*, 201 Fed. 697; *Dwinnell v. United States*, 186 Fed. 754, 108 C. C. A. 624 (9th Cir.); *Lonabaugh v. United States*, 179 Fed. 476, 478, 103 C. C. A. 56 (8th Cir.); *Jones v. United States*, 162 Fed. 417, 426, 89 C. C. A. 303 (9th Cir.); *United States v. Black*, 160 Fed. 431, 87 C. C. A. 401 (7th Cir.); *Ex parte Black*, 147 Fed. 832; *Grunberg v. United States*, 145 Fed. 81, 76 C. C. A. 51 (1st Cir.); *United States v. Mitchell*, 141 Fed. 666; *United States v. Bradford*, 148 Fed. 413; *United States v. Smith*, 2 Bond, 323, Fed. Cas. No. 16322; *United States v. Thompson*, 29 Fed. 86; *United States v. Reichert*, 32 Fed. 142; *United States v. Cole*, 153 Fed. 801; *United States v. Munday*, 186 Fed. 375; *United States v. Rogers*, 226 Fed. 512; *United States v. Sacia*, 2 Fed. 754; *In re Wolf*, 27 Fed. 606; *United States v. Babcock*, 3 Dill. 581, Fed. Cas. No. 14487; *United States v. McLaughlin*, 169 Fed. 302; *United States v. Richards*, 149 Fed. 443; *Harrison v. Moyer*, 224 Fed. 224.

upon a different footing from any others, as it is a general principle that a party cannot be punished for an evil design, unless he has taken some steps towards carrying it out.⁶ It is to be noted that this is not the situation under the Sherman Act.⁷ It is now settled that the conspiracy cannot alone constitute the offense, as was held in some of the early cases. It needs the addition of the overt act. Such act is something more, therefore, than evidence of a conspiracy. It constitutes the execution or part execution of the conspiracy and all incur guilt by it, or rather complete their guilt by it, consummating a crime by it cognizable then by the judicial tribunals, such tribunals only then acquiring jurisdiction.⁸ The overt act must be something more than evidence of a conspiracy; thus a complete confession of a conspiracy would not be equivalent to an overt act, which must constitute execution, or part execution. Apparently, it may be the act which completes the offense of defrauding, or an act so near the completion of the offense as to constitute an attempt, or an act so remote as not to amount to an attempt, but at least it must be a step towards execution.⁹ The rule is well settled that it need not appear upon the face of the indictment that the overt act was such that it could be seen to have a necessary or logical relation to the conspiracy charged. It is enough if the indictment allege that it has that effect. It is sufficient to state the overt act without alleging the manner in which it tended to effect the purposes contemplated.¹⁰ This rule of pleading was not affected by the decision in the case of *Hyde & Schneider v. United States*.¹¹ It is not necessary to show in the indictment why or how the doing

⁶ *Bannon & Mulkey v. United States*, 156 U. S. 464, 469, 39 L. ed. 494, 15 S. C. 467.

⁷ *Nash v. United States*, 229 U. S. 373, 57 L. ed. 1232, 33 S. C. 780; *Knauer v. United States*, 237 Fed. 8, 150 C. C. A. 210 (8th Cir.); *United States v. Bopp*, 237 Fed. 283.

⁸ *Hyde & Schneider v. United States*, 225 U. S. 347, 359, 56 L. ed. 1114, 32 S. C. 793, overruling all the earlier cases on this point in conflict with the statement in the text.

⁹ *Tillinghast v. Richards*, 225 Fed. 226.

¹⁰ *Houston v. United States*, 217 Fed. 852, 133 C. C. A. 562 (9th Cir.); *United States v. Benson*, 70 Fed. 591, 17 C. C. A. 293 (9th Cir.); *United States v. Sanche*, 7 Fed. 715; *United States v. Donau*, 11 Blatch. 168, Fed. Cas. No. 14983; *Gantt v. United States*, 108 Fed. 61, 47 C. C. A. 210 (5th Cir.); *United States v. Shevlin*, 212 Fed. 343.

¹¹ 225 U. S. 347, 56 L. ed. 1114, 32 S. C. 793.

of the overt act would or did or was intended to aid in effecting the object of the conspiracy. It is sufficient that the act done was done to aid in effecting that object, was so intended, even if the doing of the act, instead of actually aiding to effect the object, defeated the conspirators and actually operated to prevent the commission of the crime.¹² It need not appear that all the conspirators joined in the overt act.¹³ If the conspiracy was designed to be and was continuous, every overt act was the act of all the conspirators by reason of the terms of their unlawful plot.¹⁴ The act of one conspirator in mailing letters to defraud is as much the act of the others as if they had done the act of mailing themselves.¹⁵ Only one overt act is essential, and if one overt act is sufficiently charged, the indictment is good against demurrer whatever may be the deficiencies in other charges of overt acts.¹⁶ And where an indictment, charging conspiracy to commit an offense which may be committed in various manners, charges conjunctively the several acts specified by the statute, a conviction may be had upon proof of any one of such acts.¹⁷ Where an overt act alleged in an indictment must be qualified to make it relevant to the particular conspiracy charged, it should be pleaded with the circumstances which make it relevant.¹⁸ If the conspiracy be that one was to do the overt act, and that the other should aid and abet him, the indictment must charge what each defendant was to do.¹⁹ A charge that an overt act was done according to and

¹² *United States v. Wupperman*, 215 Fed. 135.

¹³ *United States v. Rabinowich*, 238 U. S. 78, 86, 59 L. ed. 1211, 35 S. C. 682; *Bannon & Mulkey v. United States*, 156 U. S. 464, 468, 39 L. ed. 494, 15 S. C. 467; *United States v. Cassidy*, 67 Fed. 698; *United States v. Kane*, 23 Fed. 748; *Jung Quey v. United States*, 222 Fed. 766, 138 C. C. A. 314 (9th Cir.).

¹⁴ *Brown v. Elliott*, 225 U. S. 392, 56 L. ed. 1136, 32 S. C. 812.

¹⁵ *Rose v. United States*, 227 Fed. 357, 142 C. C. A. 53 (8th Cir.).

¹⁶ *United States v. Baker*, 243 Fed. 741, 745; *United States v.*

Orr, 233 Fed. 717; *Shepard v. United States*, 236 Fed. 73, 149 C. C. A. 283 (9th Cir.); *United States v. Burkett*, 150 Fed. 208; *United States v. Cassidy*, 67 Fed. 698; *Jung Quey v. United States*, 222 Fed. 766, 138 C. C. A. 314 (9th Cir.).

¹⁷ *Shepard v. United States*, 236 Fed. 73, 149 C. C. A. 283 (9th Cir.).

¹⁸ *Tillinghast v. Richards*, 225 Fed. 226, 230, criticizing the authority of *United States v. Donau*, 11 Blatch. 168, Fed. Cas. No. 14983, and the cases which have followed it.

¹⁹ *United States v. Rogers*, 226 Fed. 512.

in pursuance of a conspiracy which has been previously recited is equivalent to charging that it was done to effect the object of the conspiracy.²⁰ The overt act must be done by a conspirator or under his direction; a mere failure on his part to prevent another from doing it is not sufficient.²¹ No act can be regarded as an overt act unless it was a positive rather than a passive one, was the act of one or more of the conspirators, and was done to effect the object of the conspiracy.²² The overt act must not be an act forming a part of the conspiracy, but a subsequent, independent act, following a completed conspiracy, and done to carry into effect the object of the original combination.²³ The overt act need not of itself be a criminal act; still less need it constitute the very crime that is the object of the conspiracy.²⁴ Acts otherwise innocent may become criminal when they are performed by the members of a criminal conspiracy to effect its object,²⁵ and an indictment charging conspiracy which seeks to make an innocent act an ingredient of the offense must allege a plan including it directly or indirectly.²⁶ Telegraphic orders by one conspirator to another directing the delivery of illegal interstate shipments of intoxicating liquor are overt acts though innocent apart from the conspiracy.²⁷ While it is necessary to

²⁰ *Dealy v. United States*, 152 U. S. 539, 38 L. ed. 545, 14 S. C. 680.

²¹ *United States v. McClarty*, 191 Fed. 518.

²² *Lonabaugh v. United States*, 179 Fed. 476, 479, 103 C. C. A. 56 (8th Cir.).

²³ *United States v. Cole*, 153 Fed. 801; *United States v. Goldberg*, 7 Bissell, 175, Fed. Cas. No. 15223; *United States v. Richards*, 149 Fed. 443.

²⁴ *United States v. Rabinowich*, 238 U. S. 78, 59 L. ed. 1211, 35 S. C. 682; *United States v. Holte*, 236 U. S. 140, 144, 59 L. ed. 504, 35 S. C. 271; *Joplin Mercantile Co. v. United States*, 236 U. S. 531, 535, 59 L. ed. 705, 35 S. C. 291; *Drew v. Thaw*, 235 U. S. 432, 59 L. ed. 302, 35 S. C. 137 (this was the

New York State Statute); *United States v. Grand Trunk Ry. Co. of Canada*, 225 Fed. 283 (giving and receiving rebates); *United States v. Cassidy*, 67 Fed. 698; *United States v. Thompson*, 29 Fed. 86.

²⁵ *Witte v. Shelton*, 240 Fed. 265, 273, 153 C. C. A. 191 (8th Cir.); *Houston v. United States*, 217 Fed. 852, 855, 133 C. C. A. 562 (9th Cir.); *United States v. Benson*, 70 Fed. 591, 17 C. C. A. 293 (9th Cir.) *United States v. Sanche*, 7 Fed. 715; *United States v. Donau*, 11 Blatch. 168, Fed. Cas. No. 14983; *United States v. Shevlin*, 212 Fed. 343; *United States v. Rintelen*, 233 Fed. 793.

²⁶ *Tillinghast v. Richards*, 225 Fed. 226.

²⁷ *Witte v. Shelton*, 240 Fed. 265, 153 C. C. A. 191 (8th Cir.).

allege in the indictment the overt act committed in furtherance of the conspiracy, it is not necessary to set forth in what manner the overt act so detailed would tend to effect the object of the conspiracy.²⁸ Overt acts committed before the formation of the conspiracy are not admissible; the indictment must aver acts after the conspiracy.²⁹ Likewise, where the alleged overt act took place after the conspiracy had been consummated, it was ineffectual as an overt act to constitute such offense.³⁰ The manner in which the several alleged overt acts tended to effect the purpose of the conspiracy need not be alleged.³¹ The indictment must allege the time and place of the act done to effect the object of the conspiracy, so as to identify the act, and show that it postdated the conspiracy, and was not merely a part of it.³² It is not essential that the overt act be done in the same jurisdiction as the conspiracy, but the general rules of pleading require allegations of the place of every traversable fact.³³ The description of overt acts does not take the place of a statement of what the conspiracy consisted. Accordingly, it was held that an indictment charging conspiracy to commit an offense under Section 215 and that two described letters were mailed in pursuance of the conspiracy was sufficient as a statement of overt acts, and that the post office was used in executing the scheme to defraud, but these charges could not be used to strengthen the charge of conspiracy, since the overt act which completes a conspiracy is a part of the conspiracy.³⁴ An overt act must be alleged and proved with the usual certainty required in criminal pleading.³⁵

²⁸ *Gruher v. United States*, 255 Fed. 474, — C. C. A. — (2d Cir., opinion per Rogers, J.); *Houston v. United States*, 217 Fed. 852, 133 C. C. A. 562 (9th Cir.); *United States v. Wupperman*, 215 Fed. 135; *United States v. Shevlin*, 212 Fed. 343; *United States v. United States Brewers' Ass'n*, 239 Fed. 163; *Gantt v. United States*, 108 Fed. 61, 47 C. C. A. 210 (5th Cir.); *United States v. Benson*, 70 Fed. 591, 17 C. C. A. 293 (9th Cir.).

²⁹ *United States v. Grodson*, 164 Fed. 157; *Dealy v. United States*, 152

U. S. 539, 38 L. ed. 545, 14 S. C. 680.

³⁰ *Ex parte Black*, 147 Fed. 832, affirmed in 160 Fed. 431.

³¹ *United States v. Pennsylvania Central Coal Co.*, 256 Fed. 703.

³² *United States v. Milner*, 36 Fed. 890.

³³ *United States v. Baker*, 243 Fed. 741, 745.

³⁴ *M'Kelvey v. United States*, 241 Fed. 801, 154 C. C. A. 503 (9th Cir.).

³⁵ *United States v. Milner*, 36 Fed. 890.

It is sufficient under Section 4 of the Espionage Act to allege that the overt acts were done to effect the object of the conspiracy.³⁶

§ 1036. Failure of Conspiracy.

The conspiracy, however fully formed, may fail of its object, however earnestly pursued; the contemplated crime may never be consummated; yet the conspiracy is none the less punishable,¹ and the crime need not be agreed upon by the conspirators in all its details.² It is sufficient that the conspiracy charged, unless interrupted, might have accomplished its unlawful purpose.³ It is not essential that the indictment should show the success of the conspiracy, nor need it show in what manner the overt act will tend to accomplish the object of the conspirators. If an unlawful combination to defraud the United States is alleged, together with an act by one of the parties to show the agreement in operation, this is sufficient, without showing how the act would tend to effect the object, or that the object was effected.⁴ An indictment need not set forth the consummation of the fraud or aver that it could have been accomplished, if not detected.⁵

§ 1037. No Pecuniary Loss Necessary.

The government need not show pecuniary or property loss or that one will result in order to establish a conspiracy to defraud.¹ The term "defraud" as used in this section should not be construed as limited to frauds upon property and property rights.

³⁶ *Frohwerk v. United States*, 249 U. S. 204, 63 L. ed. —, 39 S. C. 249.

§ 1036. ¹ *United States v. Rabino-wich*, 238 U. S. 78, 59 L. ed. 1211, 35 S. C. 682; *Williamson v. United States*, 207 U. S. 425, 52 L. ed. 278, 28 S. C. 163; *Goldman v. United States*, 245 U. S. 474, 62 L. ed. 410, 38 S. C. 166; *Chaplin v. United States*, 193 Fed. 879, 114 C. C. A. 93 (9th Cir.); *United States v. Sacia*, 2 Fed. 754; *United States v. Greene*, 115 Fed. 343; *United States v. Wilson*, 60 Fed. 890; *United States v. Newton*, 48 Fed. 218.

² *Williamson v. United States*, 207 U. S. 425, 52 L. ed. 278, 28 S. C. 163.

³ *United States v. Burkett*, 150 Fed. 208.

⁴ *Gantt v. United States*, 108 Fed. 61, 47 C. C. A. 210 (5th Cir.); *United States v. Benson*, 70 Fed. 591, 17 C. C. A. 293 (9th Cir.).

⁵ *United States v. Stamatopoulos*, 164 Fed. 524.

§ 1037. ¹ *Stager v. United States*, 233 Fed. 510, 147 C. C. A. 396 (2d Cir.); *Haas v. Henkel*, 216 U. S. 462, 54 L. ed. 569, 30 S. C. 249; *United States v. Keitel*, 211 U. S. 370, 53 L. ed. 230, 29 S. C. 123; *Hyde v. Shine*, 199 U. S. 62, 50 L. ed. 90, 25 S. C. 760; *Curley v. United States*, 130 Fed. 1, 64 C. C. A. 369

of the government, but in its broader sense, and for the protection of intangible rights, privileges and functions of the government;² the statute is broad enough to include any conspiracy to impair, obstruct or defeat the lawful function of any department of government.³ The statute is not restricted to such offenses as operate to injure the government itself; it covers every conspiracy to commit an act made an offense or crime by any law of the United States, as well as any act that may defraud the United States in any manner whatever.⁴ It is unnecessary under this section either to allege or prove a purpose to defraud the United States of a thing of pecuniary value.⁵ A conspiracy to obtain crop reports from a statistician of the Department of Agriculture in advance of the time allowed by the regulations of the Society of Agriculture falls within the prohibition of the act.⁶ It is unnecessary to warrant the conviction of an examiner of merchandise at the appraiser's stores of conspiracy to defraud the government, to show that the government was actually defrauded.⁷ But another case is to the effect that to defraud the United States is to deprive it or divest it of any property, money, or thing otherwise than as the law requires and allows.⁸

(1st Cir.); *McGregor v. United States*, 134 Fed. 187, 195; 69 C. C. A. 477 (4th Cir.); *United States v. Lonabaugh*, 158 Fed. 314; *United States v. Stone*, 135 Fed. 392; *United States v. Curley*, 122 Fed. 738 (fraudulent bounty claims); *Fall v. United States*, 209 Fed. 547, 126 C. C. A. 369 (8th Cir.); *United States v. Barnow*, 239 U. S. 74, 79, 60 L. ed. 155, 36 S. C. 19 (*dictum*); *United States v. Bunting*, 82 Fed. 883; *United States v. Moore*, 173 Fed. 122; *United States v. Raley*, 173 Fed. 159; *United States v. Scia*, 2 Fed. 754. *See also* *Radford v. United States*, 129 Fed. 49, 63 C. C. A. 491 (2d Cir.), conspiracy to defraud the United States by the execution of straw bail.

² *Curley v. United States*, 130 Fed. 1, 64 C. C. A. 369 (1st Cir.).

³ *Stager v. United States*, 233

Fed. 510, 147 C. C. A. 396 (2d Cir.); *Haas v. Henkel*, 216 U. S. 462, 479, 54 L. ed. 569, 30 S. C. 249; *United States v. Barnow*, 239 U. S. 74, 79, 60 L. ed. 155, 36 S. C. 19.

⁴ *United States v. Sanche*, 7 Fed. 715, 718; *United States v. Thomas*, 145 Fed. 74, 78; *United States v. Benson*, 70 Fed. 591, 17 C. C. A. 293 (9th Cir.).

⁵ *United States v. Bradford*, 148 Fed. 413, 421; *Curley v. United States*, 130 Fed. 1, 64 C. C. A. 369 (1st Cir.), conspiracy to defraud in civil service examination; *McGregor v. United States*, 134 Fed. 187, 195, 69 C. C. A. 477 (4th Cir.).

⁶ *Haas v. Henkel*, 216 U. S. 462, 54 L. ed. 569, 30 S. C. 249.

⁷ *Stager v. United States*, 233 Fed. 510, 147 C. C. A. 396 (2d Cir.).

⁸ *Pereles v. Weil*, 157 Fed. 419, 423, *citing* *United States v. Thompson*, 29 Fed. 86.

§ 1038. Definition of the Term "To Defraud."

The term "to defraud" as used in the statute must be read along with the words "in any manner or for any purpose" and so has a broader meaning than if it stood alone.¹ "To defraud" the government of any possession of the public lands necessarily implies that the government is thereby deprived of its title or ownership of the same.² An intent to defraud the United States is essential to a conviction under § 37 and a conspiracy to defraud the Panama Railroad Company, though it is absolutely owned by the United States, does not fall within the section. The United States in this respect abandons its sovereign capacity and can only gain redress by suit by the railroad company to recover damages.³ An indictment charging acts which would constitute a conspiracy to defraud certain of the states, but not the United States, is bad.⁴ The manifest purpose of the revenue act of 1867 was to prevent and punish frauds on the revenue. But that is no reason why the universality of its language should be so restrained in its operation. It must therefore be construed to include every conceivable case of conspiracy to defraud the United States; that is, to deprive or divest it of any property, money, or thing otherwise than as the law requires or allows.⁵ Congress intended that this conspiracy section should be applied so as to include frauds upon the United States of every kind and character. Congress aimed to protect the Government against those in whom avarice and cupidity are stronger than the desire for good government and honest execution of the laws.⁶ A charge of conspiracy to defraud the United States under this section can be predicated on acts made criminal after the enactment of the statute.⁷ Where the act defines the offense to be a crime, but provides no penalty therefor, an indictment will lie under this

§ 1038. ¹ *United States v. Keitel*, 211 U. S. 370, 393, 53 L. ed. 230, 29 S. C. 123.

² *United States v. Thompson*, 29 Fed. 86.

³ *Salas v. United States*, 234 Fed. 842, 148 C. C. A. 440 (2d Cir.).

⁴ *In re Benson*, 131 Fed. 968.

⁵ *United States v. Thompson*, 29 Fed. 86.

⁶ *United States v. Keitel*, 211 U. S. 370, 372, 53 L. ed. 230, 29 S. C. 123.

⁷ *United States v. Keitel*, 211 U. S. 370, 53 L. ed. 230, 29 S. C. 123; *Hyde v. Shine*, 199 U. S. 62, 50 L. ed. 90, 25 S. C. 760.

section for conspiracy to commit the crime.⁸ The United States can, of course, be defrauded without concerted action.⁹ Section 5440 (now Section 37 of Penal Code) must be strictly construed.¹⁰

§ 1039. Indictment — Certainty in General.

The statute does not strike at common law crimes and offenses; therefore, the common law test of the validity of the indictment cannot be applied.¹ If the facts constituting the purpose of the conspiracy, when fully stated, show that they constitute no crime, the indictment is of course fatally defective.² An indictment for conspiracy, like any other indictment, must be based upon competent evidence or else it is invalid.³ To constitute a good indictment under this section, it must charge that the conspiracy was to do some act made a crime by the laws of the United States, and it must state with reasonable certainty the acts intended to be effected or carried out by the agreement of the parties so that it can be seen the object of the conspiracy was a crime against the United States. The conspiracy or agreement, and the doing of some act in furtherance of it, make up the offense. The object of it, however, is a requisite of the indictment.⁴ The indictment must state with reasonable certainty the acts intended to be effected or carried out by the agreement of the parties, so that it can be seen that the object of the conspiracy was a crime against the United States.⁵ An indictment for conspiracy should charge the offense which is the object of the conspiracy with reasonable certainty, and it should not be necessary to gather the case from mere inference.⁶ However, in charging conspiracy, the authorities

⁸ United States *v.* Tosoka, 163 Fed. 129.

⁹ United States *v.* Burke, 221 Fed. 1014, bribery of United States officer in purchase of tobacco.

¹⁰ United States *v.* Robbins, 157 Fed. 999.

§ 1039. ¹ United States *v.* Benson, 70 Fed. 591, 594, 17 C. C. A. 293 (9th Cir.).

² United States *v.* Biggs, 211 U. S. 507, 521, 53 L. ed. 305, 29 S. C. 181.

³ United States *v.* Rubin, 218 Fed. 245.

⁴ In re Wolf, 27 Fed. 606, 611; Radin *v.* United States, 189 Fed. 569, 111 C. C. A. 6 (2d Cir.); Sugar *v.* United States, 252 Fed. 79, 164 C. C. A. 191 (6th Cir.).

⁵ United States *v.* Taffe, 86 Fed. 113; In re Wolf, 27 Fed. 606, 611; United States *v.* Benson, 70 Fed. 591, 17 C. C. A. 293 (9th Cir.); United States *v.* Lyman, 190 Fed. 414, 416.

⁶ United States *v.* Atlanta Journal Co., 185 Fed. 656, 662; Pettibone *v.* United States, 148 U. S. 197, 37 L. ed. 419, 13 S. C. 542.

all agree that the offense which is intended to be committed need not be described with the particularity required in an indictment in which such matter is charged as a substantive crime.⁷ An indictment which does not satisfy the constitutional right of the defendants to be informed of the nature and cause of the accusation is fatally defective.⁸ The conspiracy is the gist of the offense and certainty to a common intent, sufficient to identify the offense which the defendants conspired to commit, is all that is required.⁹ This is especially true if the mode of execution has not been agreed upon definitely.¹⁰ But it does not follow that no particulars whatever of the offense need be given.¹¹ It is not sufficient, in indictments for violation of federal statutes, merely to charge in general terms a conspiracy to defraud the United States.¹² There are no common law offenses in the United States Courts, and for this reason, unless the indictment shows on its face by specific averments of fact that the defendants have violated some provisions of a Federal law, the indictment will be dismissed.¹³

⁷ *United States v. United States Brewers' Ass'n*, 239 Fed. 163; *Dealy v. United States*, 152 U. S. 539, 38 L. ed. 545, 14 S. C. 680; *Ching v. United States*, 118 Fed. 538, 55 C. C. A. 304 (4th Cir.); *United States v. Wilson*, 60 Fed. 890; *Knauer v. United States*, 237 Fed. 8, 150 C. C. A. 210 (8th Cir.); *Lew Moy v. United States*, 237 Fed. 50, 150 C. C. A. 252 (8th Cir.); *Aczel v. United States*, 232 Fed. 652, 659, 146 C. C. A. 578 (7th Cir.); *United States v. Rintelen*, 233 Fed. 793; *Thomas v. United States*, 156 Fed. 897, 84 C. C. A. 477 (8th Cir.); *Spèar v. United States*, 228 Fed. 485, 143 C. C. A. 67 (8th Cir.); *United States v. Farmer*, 218 Fed. 929; *Tapack v. United States*, 220 Fed. 445, 135 C. C. A. 39 (3d Cir.); *United States v. Maxey*, 200 Fed. 997; *Ex parte Lyman*, 202 Fed. 303; *Sugar v. United States*, 252 Fed. 79, 164 C. C. A. 191 (6th Cir.); *Jelke v. United States*, 255 Fed. 264, — C. C. A. — (7th Cir.); *Prettyman v. United*

States, 180 Fed. 30, 42, 103 C. C. A. 384 (6th Cir.); *Richards v. United States*, 175 Fed. 911, 99 C. C. A. 401 (8th Cir.); *Lemon v. United States*, 164 Fed. 953, 90 C. C. A. 617 (8th Cir.); *In re Latimer*, 141 Fed. 665.

⁸ *United States v. Melfi*, 118 Fed. 899; *United States v. Greene*, 115 Fed. 343.

⁹ *United States v. United States Brewers' Ass'n*, 239 Fed. 163; *Williamson v. United States*, 207 U. S. 425, 52 L. ed. 278, 28 S. C. 163; *United States v. Stevens*, 44 Fed. 132.

¹⁰ *United States v. Downey*, 257 Fed. 364.

¹¹ *United States v. Bopp*, 230 Fed. 723.

¹² *Smith v. United States*, 231 Fed. 25, 31, 145 C. C. A. 213 (9th Cir.); *Keck v. United States*, 172 U. S. 434, 43 L. ed. 505, 19 S. C. 254.

¹³ *United States v. Britton*, 108 U. S. 192, 27 L. ed. 703, 2 S. C. 525; *Fain v. United States*, 209 Fed. 525, 126 C. C. A. 347 (8th Cir.); *Joplin*

But it is not sufficient to set forth the offense in the words of the statute unless the accused is thereby apprised with reasonable certainty of the nature of the accusation against him, so that he may prepare his defense and plead the judgment as a bar to any subsequent prosecution for the same offense.¹⁴ But where no objection was made to the indictment before trial, or interposed to the introduction of testimony, and no request was made to limit the scope of the charge in the instructions of the court, and the defendants were not misled to their prejudice, the indictment, though general in terms and lacking in particulars, was held sufficient after verdict.¹⁵ The conspiracy must be sufficiently charged, and it cannot be aided by the averments of acts done by one or more of the conspirators in furtherance of the object of the conspiracy.¹⁶ A conspiracy must be found in the clause of the indictment which sets it forth, and cannot be enlarged by the overt acts alleged.¹⁷ The insufficiency of the indictment as to the description of the offense cannot be aided by averments of acts done in furtherance of the object of the conspiracy.¹⁸

§ 1040. Allegations of Overt Acts.

The crime is not complete until an overt act is committed by at least one conspirator.¹ Therefore, the indictment must allege definitely an overt act in furtherance of the conspiracy.² An averment in an indictment of a certain act done by the defendant "according to and in pursuance of said conspiracy" was held to

Mercantile Co. v. United States, 236 U. S. 531, 59 L. ed. 705, 35 S. C. 291; *Thomas v. United States*, 156 Fed. 897, 84 C. C. A. 477 (8th Cir.); *United States v. Lyman*, 190 Fed. 414.

¹⁴ *United States v. Britton*, 107 U. S. 655, 27 L. ed. 520, 2 S. C. 512; *In re Benson*, 58 Fed. 962.

¹⁵ *Smith v. United States*, 231 Fed. 25, 145 C. C. A. 213 (9th Cir.).

¹⁶ *Conrad v. United States*, 127 Fed. 798, 801, 62 C. C. A. 478 (5th Cir.), *quoting* *United States v. Britton*, 108 U. S. 199, 204, 27 L. ed. 703, 2 S. C. 525.

¹⁷ *Tillinghast v. Richards*, 225

Fed. 226; *Dwinnell v. United States*, 186 Fed. 754, 108 C. C. A. 624 (9th Cir.); *United States v. Baker*, 243 Fed. 741; *United States v. Britton*, 108 U. S. 199, 205, 27 L. ed. 703, 2 S. C. 525; *Joplin Mercantile Co. v. United States*, 236 U. S. 531, 535, 59 L. ed. 705, 35 S. C. 291; *United States v. Patterson*, 55 Fed. 605.

¹⁸ *United States v. Taffe*, 86 Fed. 113; *Pettibone v. United States*, 148 U. S. 197, 37 L. ed. 419, 13 S. C. 542.

§ 1040. ¹ *Hyde v. United States*, 225 U. S. 347, 56 L. ed. 1114, 32 S. C. 793.

² See *supra*, § 1035.

mean that such overt act was committed after the formation of the conspiracy.³ An indictment which sets forth definitely the names of the alleged conspirators, the conspiracy to commit an offense against the United States, the nature of the offense, the time and place, and the overt acts committed in and for the purpose of executing the same, is sufficient.⁴ An indictment for conspiracy to violate the Espionage Act by obstructing recruiting sufficiently alleges the defendant's intent by stating that he and another conspired to accomplish it.⁵ The use in an indictment for conspiracy, in connection with the verb "conspire", of other words or phrases of similar import, such as "combine", "confederate", etc., while usual and proper, is not essential.⁶ Common words are to be used as descriptive of the matter in the indictment, and without abbreviations.⁷ An indictment for conspiracy to defraud by means of a scheme to be prosecuted through the mails was held not fatally defective because it alleged the defendant's intent to perpetrate the offense in the descriptive, as distinguished from the charging part of the indictment.⁸ An indictment which charges a conspiracy to devise a scheme to defraud in the sale of corporate stock and furthering such scheme by opening correspondence through the mail, sufficiently charges a conspiracy to commit an offense against the United States.⁹ An indictment for conspiracy was held to be sufficient when it identified the offense which the defendants were charged with conspiring to commit. An indictment which charged in ordinary and concise language that the defendants conspired to effect an entry of sugars at less than their true weights, and that the means by which such entry was to be effected were false and fraudulent statements of the weight, was held sufficient.¹⁰ An indictment for conspiracy is defective which fails to make it clear within what jurisdiction

³ *Dealy v. United States*, 152 U. S. 539, 38 L. ed. 545, 14 S. C. 680.

⁴ *United States v. United States Brewers' Ass'n*, 239 Fed. 163.

⁵ *Frohwerk v. United States*, 249 U. S. 209, — L. ed. —, 39 S. C. 249.

⁶ *Wright v. United States*, 108 Fed. 805, 48 C. C. A. 37 (5th Cir.).

⁷ *United States v. Reichert*, 32 Fed. 142 (authority of United States

surveyor to approve claim should be set out in the indictment to approve false claim).

⁸ *United States v. Maxey*, 200 Fed. 997.

⁹ *Wilson v. United States*, 190 Fed. 427, 111 C. C. A. 231 (2d Cir.).

¹⁰ *Heike v. United States*, 192 Fed. 83, 112 C. C. A. 615 (2d Cir.).

the offense was committed.¹¹ The unlawful combination must be charged and proven against all the members of the conspiracy, each one of whom is then held responsible for the acts of all,¹² while the doing of the overt acts may be charged only against those who committed them.¹³

§ 1041. Knowledge and Intent.

Knowledge of the criminality of the object of the conspiracy has been held essential in indictments for conspiracy,¹ and where, as is usually the case, intent is an essential element of such offense, it also must be alleged in the indictment.² But an averment in terms of criminal intent is not indispensable where the facts alleged necessarily import such intent.³ An indictment for conspiracy to defraud, which sets out the unlawful agreement, need not aver intent to defraud the United States.⁴ But where intent is an essential part of the offense, as defined by the statute, such intent must be averred.⁵ An indictment charging conspiracy for a violation of a statute need not negative an exception found in such statute.⁶ The language in the Stokes cases⁷ as to the necessary averments does not mean that it must be distinctly and separately charged in the indictment that the defendants conspired to commit each element of the offense, such elements being separately stated.⁸ An indictment charging a conspiracy,

¹¹ *United States v. Marx*, 122 Fed. 964.

¹² *Bannon v. United States*, 156 U. S. 464, 39 L. ed. 494, 15 S. C. 467.

¹³ *Ibid.*

§ 1041. ¹ *Salla v. United States*, 104 Fed. 544, 44 C. C. A. 26 (9th Cir.); *Pettibone v. United States*, 148 U. S. 197, 37 L. ed. 419, 13 S. C. 542; *Conrad v. United States*, 127 Fed. 798, 62 C. C. A. 478 (5th Cir.); *United States v. Melfi*, 118 Fed. 899; *United States v. Adler*, 49 Fed. 736; *United States v. Peuschel*, 116 Fed. 642.

² *United States v. Moore*, 173 Fed. 122; *United States v. Cruikshank*, 92 U. S. 542, 23 L. ed. 588; *United States v. Green*, 136 Fed. 618; *Pereles v. Weil*, 157 Fed. 419;

Conrad v. United States, 127 Fed. 798, 62 C. C. A. 478 (5th Cir.).

³ *United States v. Shevlin*, 212 Fed. 343; *United States v. Moore*, 173 Fed. 122; *Van Gesner v. United States*, 153 Fed. 46, 82 C. C. A. 180 (9th Cir.); *United States v. Donau*, 11 Blatch. 168, Fed. Cas. No. 14983.

⁴ *United States v. Stone*, 135 Fed. 392.

⁵ *United States v. Green*, 136 Fed. 618, *affirmed* 199 U. S. 601.

⁶ *United States v. Stone*, 135 Fed. 392; *Jelke v. United States*, 255 Fed. 264, — C. C. A. — (7th Cir.).

⁷ 157 U. S. 187, 39 L. ed. 667, 15 S. C. 617.

⁸ *McConkey v. United States*, 171 Fed. 829, 831, 96 C. C. A. 501 (8th Cir.).

to which a corporation, through its officers and agents, was a party, to conceal assets, was held not objectionable for failure to allege definitely the corporation's insolvency at the time of selling the assets, or that the assets concealed had been demanded of the defendants and delivery refused.⁹ An indictment need not set forth the names of the intended victims of the conspiracy, and is not bad because it does not say that their names are to the grand jury unknown.¹⁰ An indictment charging the accused with a conspiracy to commit the crime of subornation of perjury in proceedings for the purchase of public lands was held to be sufficient, although the precise persons to be suborned and the time and place of such suborning were not particularized.¹¹ An indictment charging a general conspiracy to bring in Chinese aliens not lawfully entitled to enter the United States need not set forth the names of the persons who were brought into the United States.¹² A count in an indictment which charged that four named persons, one of them being the defendant, conspired to commit the offense denounced by Section 29 *b* of the Bankruptcy Act against one who knowingly and fraudulently conceals while a bankrupt or after his discharge, from his trustee, any of the property belonging to his estate in bankruptcy, and that one or more of such parties did a specified act to effect the object of the conspiracy, was held to be sufficient.¹³ Time and place, if the venue be stated, are merely formal requisites in an indictment for conspiracy.¹⁴

§ 1042. Indictment — Duplicity.

A charge in a single count of a conspiracy to violate two or more laws of the United States is not duplicitous.¹ The United

⁹ *United States v. Rosenstein*, 211 Fed. 738.

¹⁰ *United States v. Stone*, 188 Fed. 836, 841; *Williamson v. United States*, 207 U. S. 425, 449, 52 L. ed. 278, 28 S. C. 163; *Dwinnell v. United States*, 186 Fed. 754.

¹¹ *Williamson v. United States*, 207 U. S. 425, 52 L. ed. 278, 28 S. C. 163.

¹² *United States v. Dahl*, 225 Fed. 909.

¹³ *Frankfurt v. United States*, 231

Fed. 903, 146 C. C. A. 99 (5th Cir.); *Cohen v. United States*, 157 Fed. 651, 85 C. C. A. 113 (2d Cir.).

¹⁴ *United States v. McKinley*, 127 Fed. 168, 170; *United States v. Conrad*, 59 Fed. 458; *United States v. Howard*, 132 Fed. 325; *Considine v. United States*, 112 Fed. 342, 50 C. C. A. 272 (6th Cir.); *Dealy v. United States*, 152 U. S. 539, 38 L. ed. 545, 14 S. C. 680.

§ 1042. ¹ *Knauer v. United States*, 237 Fed. 8, 13, 150 C. C. A. 210

States Supreme Court has never countenanced the idea, entertained by some courts, that a single count in an indictment for conspiring to commit two offenses is bad for duplicity. The conspiracy is the crime, and that is the one, however diverse its objects.² The fact that the indictment shows in charging overt acts that a completed offense was committed does not render the indictment duplicitous.³ And the charging in a single count of more than one separate and distinct overt act is not charging separate and distinct offenses.⁴ An indictment charging a bankrupt and another with conspiracy to conceal property from the bankrupt's trustee, and also alleging concealment by the bankrupt, is not bad for duplicity. The crime of conspiracy, from its very nature, proceeds or contemplates the perpetration of another offense, and a charge of conspiracy under the statute, without an allegation of the offense to which the conspiracy relates, as being intended or consummated, would be wholly impossible of statement.⁵ An indictment which, in charging the offense in general terms of conspiracy to unlawfully and willfully aid and abet and procure persons to violate the Conscription Act by refusing to register, but which, in stating the acts alleged to constitute the crime, makes it quite clear that the defendants are charged with conspiracy to commit an offense against the United States and not to defraud the United States, is not bad for duplicity, the words "to defraud the United States" being mere surplusage.⁶ Where there was but one conspiracy and overt acts were continually done in pursuance thereof which are set up in various ways in several counts of the indictment,

(8th Cir.); *Joplin Mercantile Co. v. United States*, 213 Fed. 926, 131 C. C. A. 160 (8th Cir.); *John Gund Brewing Co. v. United States*, 206 Fed. 386, 124 C. C. A. 268 (8th Cir.).

² *Frohwerk v. United States*, 249 U. S. 204, — L. ed. —, 39 S. C. 249. This case overrules all cases to the contrary of the lower Federal Courts.

³ *United States v. Rogers*, 226 Fed. 512; *Stanley v. United States*, 195 Fed. 896, 902, 115 C. C. A. 584

(8th Cir.); *McConkey v. United States*, 171 Fed. 829, 96 C. C. A. 501 (8th Cir.); *United States v. Downey*, 257 Fed. 364.

⁴ *Stanley v. United States*, 195 Fed. 896, 903, 115 C. C. A. 584 (8th Cir.); *United States v. Eccles*, 181 Fed. 906.

⁵ *Steigman v. United States*, 220 Fed. 63, 135 C. C. A. 631 (3d Cir.).

⁶ *United States v. Sugar*, 243 Fed. 423.

then the effect of all the counts in the indictment is to charge but one offense and not several offenses under each count of the indictment.⁷

§ 1043. Joinder of Counts Held Good.

Under Revised Statutes, § 1024, counts for using the mails to defraud and for conspiracy to commit the offense, where based upon the same transaction, may be joined in one indictment.¹ An indictment charging a postmaster and others with conspiring under Section 37 to violate Sections 206 and 208, by the sale and purchase of stamps in large quantities to be used at other post offices with the purpose of fraudulently increasing the postmaster's salary and also charging violation of authorized regulations of the Department in that respect is sufficient.²

§ 1044. Misjoinder of Counts Held Bad.

When certain persons combine to perform certain acts and some of them combine with others engaged in totally different acts, though all may have a similar general purpose in view, it is error to join them in an indictment for conspiracy. But if there was an original general plan in which all the defendants participated — some in greater and some in less degree — as to defraud the public in the sale of corporate stock, it was not split up into separate conspiracies by the later formation of agencies to sell the stock in different parts of the country, even though some of the defendants profited from one agency and some from the other, and one defendant from both.¹ It is improper to include in a joint indictment parties who were not privy to the acts relied on to prove the conspiracy and whose offenses are entirely separate and distinct. This is characterized as “unfair and unjust, as tending to involve them in the odium of acts to which they were not parties.”²

⁷ *United States v. Howell*, 56 Fed. 21; *United States v. Burkett*, 150 Fed. 208, 213; *United States v. Gates*, Fed. Cas. No. 15191.

§ 1043. ¹ *United States v. Clark*, 125 Fed. 92.

² *United States v. Foster*, 233

U. S. 515, 58 L. ed. 1074, 34 S. C. 666.

§ 1044. ¹ *Wilson v. United States*, 190 Fed. 427, 436, 111 C. C. A. 231 (2d Cir.).

² *Reg. v. Boulton*, 12 Cox (C. C.), 87.

§ 1045. Surplusage.

Where more than two are charged as conspirators, it is sufficient if the proof show that two were guilty; the charge as to the others is surplusage.¹

§ 1046. Charging Overt Acts by Reference.

Where there are several counts, each presenting a different overt act, it is competent to avoid repetition by referring to the conspiracy as described in the first count.¹

§ 1047. Indictment — Averment of Means.

An indictment for a conspiracy should charge the object of the conspiracy, but need not charge the means to be employed. Of course, in a conspiracy to effect a lawful purpose by unlawful means, the unlawful means constitute the object of the conspiracy to such an extent that they should be as fully set out as the nature of the case will permit.¹ The foregoing appears to state the true rule, and explains any apparent discrepancy between the decisions. An indictment under this section which avers the conspiracy and then sets out the overt acts done to carry it into effect is sufficient, and it is not necessary to aver the means agreed on to effect the conspiracy to commit an unlawful offense.² The gist of the offense being the unlawful combination, it is not necessary to aver the means employed to carry the unlawful combination into effect.³ Where the statute itself makes the conspiracy a distinct crime, unlawful or criminal means need not be set out in the indictment.⁴ When the criminal-

§ 1045. ¹ *Breese v. United States*, 203 Fed. 824, 122 C. C. A. 142 (4th Cir.); *United States v. Sacia*, 2 Fed. 754, 758; *Browne v. United States*, 145 Fed. 1, 13, 76 C. C. A. 31 (2d Cir.); *United States v. Richards*, 149 Fed. 443, 453.

§ 1046. ¹ *Browne v. United States*, 145 Fed. 1, 76 C. C. A. 31 (2d Cir.).

§ 1047. ¹ *United States v. Milner*, 36 Fed. 890, 891.

² *Jelke v. United States*, 255 Fed. 264, — C. C. A. — (7th Cir.); *United States v. Benson*, 70 Fed. 596, 17

C. C. A. 293 (9th Cir.); *United States v. Dennee*, 3 Woods, 47, 50, Fed. Cas. No. 14948; *United States v. Goldman*, 3 Woods, 187, 192, Fed. Cas. No. 15225; *United States v. Dustin*, 2 Bond, 332, Fed. Cas. No. 15011; *United States v. Sanche*, 7 Fed. 715; *United States v. Gordon*, 22 Fed. 250; *United States v. Adler*, 49 Fed. 736.

³ *Perrin v. United States*, 169 Fed. 17, 21, 94 C. C. A. 385 (9th Cir.).

⁴ *Mays v. United States*, 179 Fed. 610, 103 C. C. A. 168 (9th Cir.).

ity of a conspiracy consists in an unlawful agreement of two or more persons to compass or promote some criminal or illegal purpose, that purpose must be fully and clearly stated in the indictment; while if the criminality of the offense consists in the agreement to accomplish a purpose not in itself criminal or unlawful, by criminal or unlawful means, the means must be set out.⁵ It is not necessary to state the means by which the illegal object was to be effected, as the conspiracy may be complete before the means to be used are taken into consideration.⁶ An indictment must be free from ambiguity, uncertainty, and repugnance, and clearly state every ingredient of the offense charged. It is not necessary, however, to set out the means by which a conspiracy is to be carried out; nor that they are a part of the agreement or confederation; nor what part each conspirator is to play; nor the character of the acts to be performed to effectuate the purpose. It is the conspiracy to do the unlawful thing that is the gravamen of the offense.⁷ It is sufficient if the indictment contains a general description of the means by which the object of the conspiracy is to be attained.⁸ As all cheating and defrauding has not been made criminal, it is necessary for the indictment to state the means proposed, in order that the court may see that they are in fact illegal.⁹ A mere charging of the offense in the language of the statute is insufficient and the means by which conspiracy was contemplated will be considered for the purpose of ascertaining whether an offense against the United States was in fact com-

⁵ *Pettibone v. United States*, 148 U. S. 197, 203, 37 L. ed. 419, 13 S. C. 542.

⁶ *Jelke v. United States*, 255 Fed. 264, — C. C. A. — (7th Cir.); *United States v. Dennee*, 3 Woods, 47, Fed. Cas. No. 14948; *United States v. Goldman*, 3 Woods, 187, Fed. Cas. No. 15,225; *Bannon & Mulkey v. United States*, 156 U. S. 464, 39 L. ed. 494, 15 S. C. 467; *Perrin v. United States*, 169 Fed. 17, 21, 94 C. C. A. 385 (9th Cir.); *United States v. Benson*, 70 Fed. 591, 17 C. C. A. 293 (9th Cir.); *United States v. Gordon*, 22 Fed. 250; *Craw-*

ford v. United States, 212 U. S. 183, 53 L. ed. 465, 29 S. C. 260.

⁷ *United States v. Dahl*, 225 Fed. 909.

⁸ *Houston v. United States*, 217 Fed. 852, 856, 133 C. C. A. 562 (9th Cir.); *Crawford v. United States*, 212 U. S. 183, 192, 53 L. ed. 465, 29 S. C. 260; *Dealy v. United States*, 152 U. S. 539, 543, 38 L. ed. 545, 14 S. C. 680.

⁹ Chief Justice Waite in *United States v. Cruikshank*, 92 U. S. 542, 558, 23 L. ed. 588 (not under § 5440 but § 6, Enforcement Act).

mitted.¹⁰ It is immaterial what means were used to defraud, as it is criminal to conspire to defraud the United States in any manner or for any purpose, and the court does not care to know whether the mode adopted to accomplish the end proposed is made criminal or not.¹¹ An indictment attempting to charge conspiracy is sufficient if it follows the language of the statute and contains a sufficient statement of an overt act to effect the object of the conspiracy,¹² excepting where the object of the conspiracy is in itself lawful, in which case the means must be set forth with such particularity as to disclose their illegality and the intended criminal intent,¹³ and except also those cases where the conspiracy is to defraud the government in a manner that would not permit of the defendants being fairly and reasonably informed of the character of the offense without such detailed statement of the means and the time and place being set forth.¹⁴ All unlawful conspiracies must be attended with a corrupt motive. Without the corrupt motives of the confederates, no criminality can attach to the confederation. The corrupt motive may be made to appear by the indictment in two ways — one, in charging that the object of the conspiracy is to accomplish an unlawful act. In such case the intent is made to appear by the charge of a combination to do the unlawful or fraudulent act. The other way is by charging a combination to do a lawful act, or an act innocent in itself, by unlawful means. In such a case the intent or corrupt motive must appear through the allegations of the means employed to effect the object of the conspiracy.¹⁵ Where an indictment for a conspiracy does not set forth the object specifically, and show that such object is a legal crime, it should particularly set forth the means to be used by the conspirators, and show that these means are criminal.¹⁶ It is sufficient that the means be set out with such

¹⁰ *United States v. Biggs*, 211 U. S. 507, 53 L. ed. 305, 29 S. C. 181; *United States v. Britton*, 108 U. S. 199, 27 L. ed. 698, 2 S. C. 531; *Fain v. United States*, 209 Fed. 525, 126 C. C. A. 347 (8th Cir.).

¹¹ *United States v. Gordon*, 22 Fed. 250. See also *Jelke v. United States*, 255 Fed. 264, — C. C. A. — (7th Cir.).

¹² *Jelke v. United States*, 255 Fed. 264, 275, — C. C. A. — (7th Cir.).

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ *United States v. Moore*, 173 Fed. 122, 132 (giving illustration).

¹⁶ *Jelke v. United States*, 255 Fed. 264, — C. C. A. — (7th Cir.); *United States v. Gardner*, 42 Fed. 829.

particularity as will put the defendant on notice of what he is to meet at the trial.¹⁷ A conspiracy between the defendant and another to obstruct recruiting would be criminal, even if no means were agreed upon specifically whereby to accomplish the intent. It is enough if the parties agree to set to work for a common purpose which could be accomplished or aided by persuasion as well as by false statements. The indictment need not allege that false reports were made or intended to be made.¹⁸

§ 1048. Withdrawal from Conspiracy.

Until a conspirator affirmatively withdraws from a continuing conspiracy, the statute of limitations is prevented from running. A disclosure to the government by a conspirator does not amount to a withdrawal that would start the statute running if he thereafter commits overt acts.¹ But an overt act committed by one of the alleged co-conspirators within the three years pursuant to a conspiracy between him and the defendant formed and followed by an overt act more than three years prior to the filing of the indictment, without the defendant's consent or agreement within the three years to the continued existence and execution of the conspiracy, is incompetent to establish its existence and his participation therein within the three years.² Where an act must be committed at a particular time in order to constitute a criminal offense, time is material and must be accurately averred. But it is only necessary in these cases to allege the time as being within the statute of limitations.³ The essential point is that the conspiracy existed before the date of the overt act alleged and continued to exist at the time of the overt act being committed.⁴ So long as it may be shown that the conspirators are acting together for the common purpose comprehended by the scheme, and have, while so acting together, committed some overt act,

¹⁷ *United States v. Raley*, 173 Fed. 159.

¹⁸ *Frohwerk v. United States*, 249 U. S. 204, 63 L. ed. —, 39 S. C. 249.

§ 1048. ¹ *Hyde v. United States*, 225 U. S. 347, 56 L. ed. 1114, 32 S. C. 793; *Hedderly v. United States*, 193 Fed. 561, 114 C. C. A. 227 (9th Cir.).

² *Ware v. United States*, 154 Fed. 577, 84 C. C. A. 503 (8th Cir.).

³ *Hardy v. United States*, 186 U. S. 224, 46 L. ed. 1137, 22 S. C. 889; *United States v. Simmons*, 96 U. S. 360, 24 L. ed. 819.

⁴ *Bradford v. United States*, 152 Fed. 617, 81 C. C. A. 607 (5th Cir.).

all within the three years prior to the finding of the indictment, the statute has not run. A conspirator may withdraw from the common purpose; if he does so, and three years have run without his participation, although others of the original conspirators may have continued in the execution of the common design, he could not be prosecuted. But as to those who are still participating in the effectuation of the unlawful purpose when the overt act is committed, being committed within the three years, they are still confederating, conspiring and agreeing together, and are chargeable with having committed the offense of conspiracy within the statute fixing the limitation for prosecuting the same.⁵ Until one of the conspirators does some act to effect the object of the conspiracy, all the parties may withdraw and thus escape the penalty prescribed by the statute.⁶ The fact that one of the conspirators was the servant of another conspirator does not preclude there being a conspiracy between them. Until the servant affirmatively withdraws from the conspiracy, his acts bind his employer and co-conspirator so far as preventing the statute of limitations from running is concerned.⁷

§ 1049. Limitations.

The weight of authority is to the effect that where the conspiracy was formed more than three years prior to the indictment, and acts in pursuance thereof are done both prior to and within the three years, the limitation statute does not bar the prosecution.¹ An offense is consummated when the first overt act is

⁵ *United States v. Raley*, 173 Fed. 159, 167.

⁶ *United States v. Britton*, 108 U. S. 199, 205, 27 L. ed. 698, 2 S. C. 531; *United States v. Stevens*, 44 Fed. 132.

⁷ *Hyde v. United States*, 225 U. S. 347, 56 L. ed. 1114, 32 S. C. 793.

§ 1049. ¹ *Breese v. United States*, 203 Fed. 824, 830, 122 C. C. A. 142 (4th Cir.); *Wilson v. United States*, 190 Fed. 427, 435, 111 C. C. A. 231 (2d Cir.); *Hedderly v. United States*, 193 Fed. 561, 569, 114 C. C. A. 227 (9th Cir.); *Stager v. United States*,

233 Fed. 510, 147 C. C. A. 396 (2d Cir.); *Cooper v. United States*, 232 Fed. 81, 146 C. C. A. 273 (2d Cir.); *United States v. Kissel*, 218 U. S. 601, 54 L. ed. 1168, 31 S. C. 124; *Meyer v. United States*, 220 Fed. 800, 135 C. C. A. 564 (9th Cir.); *Jones v. United States*, 162 Fed. 417, 426, 89 C. C. A. 303 (9th Cir.); *United States v. Barber*, 157 Fed. 889; *Bradford v. United States*, 152 Fed. 616, 81 C. C. A. 606 (5th Cir.); *Jones v. United States*, 162 Fed. 417, 426, 89 C. C. A. 303 (9th Cir.); *Lona-baugh v. United States*, 179 Fed.

committed, and from that date the statute of limitations begins to run.² A special plea in bar, based on the statute of limitations, to an indictment for conspiring under this section, and which contained allegations of the continuance of the conspiracy to the date of filing, was held not permissible; that defense must be made under the general issue.³ The commission of an overt act is, *per se*, a renewal of the conspiracy.⁴ If the defendant comes into the conspiracy within the three years, the offense is not barred by limitations.⁵ The offense defined by Section 37 was a continuing one so long as it was in process of execution as manifested by overt acts in pursuance thereof.⁶ Where a conspiracy to defraud the United States was formed more than three years prior to the indictment, an act in pursuance thereof done both prior to and within the three years does not bar the prosecution, as the conspiracy may be a continuing offense and it may be alleged and proven that it was continued in force and operation to a time within the statutory period of limitation.⁷ In respect to the limitation provision of three years, both fact and date of the overt act are frequently of the utmost materiality.⁸ An indictment which alleged that the defendants during all the times between May 25, 1902, and the commission of the last overt act therein set forth continued to conspire together to defraud the United States of the title to its public lands in the manner and by the means agreed on between them on that date, was not

476, 478, 103 C. C. A. 56 (8th Cir.); *United States v. Bradford*, 148 Fed. 413, 419; *United States v. Brace*, 149 Fed. 874, 877; *Ware v. United States*, 154 Fed. 577, 579, 84 C. C. A. 503 (8th Cir.); *United States v. Greene*, 115 Fed. 343, 347; *Hyde v. United States*, 225 U. S. 347, 56 L. ed. 1114, 32 S. C. 793. *To the contrary* are the following: *United States v. Owen*, 32 Fed. 534; *United States v. McCord*, 72 Fed. 159; *Ex parte Black*, 147 Fed. 832, 841; *United States v. Biggs*, 157 Fed. 264, 273.

² *United States v. Biggs*, 157 Fed. 264.

³ *United States v. Barber*, 219 U. S. 72, 55 L. ed. 99, 31 S. C. 209.

⁴ *United States v. Bradford*, 148 Fed. 413, 419.

⁵ *United States v. Francis*, 144 Fed. 520.

⁶ *United States v. Brace*, 149 Fed. 874.

⁷ *Houston v. United States*, 217 Fed. 852, 859, 133 C. C. A. 562 (9th Cir.); *Hedderly v. United States*, 193 Fed. 561, 569, 114 C. C. A. 227 (9th Cir.); *United States v. Kissel*, 218 U. S. 601, 54 L. ed. 1168, 31 S. C. 124.

⁸ *United States v. Black*, 160 Fed. 431, 435, 87 C. C. A. 401 (7th Cir.).

equivalent to a charge that the defendants subsequent to that date entered into a new conspiracy to accomplish their unlawful designs, but was merely an allegation that the conspiracy formed on that day was never abandoned, but was in continuous operation thereafter until the date of the last overt act charged.⁹ Conspiracy to conceal assets from a trustee continues to the date of the refusal to turn over the property to the trustee on his election.¹⁰ The conspiracy may either end and be accomplished by one or several acts which complete the offense, or it may be made a continuing conspiracy by the parties by a course of conduct in violation of law to effect its purposes.¹¹ And a general allegation of the continuance of the conspiracy is an averment of a substantive fact and is sufficient.¹² Conspiracy to commit an offense against the Bankruptcy Act is not one "arising under" that act and the general limitation of three years applies.¹³ In *Lonabaugh v. United States*,¹⁴ the Circuit Court of Appeals of the Eighth Circuit considered the relation of the overt acts to the conspiracy and their effect in determining the application of the statute of limitations. The court said, by Mr. Justice Van Devanter, then Circuit Judge: "While the gravamen of the offense is the conspiracy, the terms of § 5440 (U. S. Comp. Stat., 1901, p. 3676) are such that there also must be an overt act to make the offense complete (*Hyde v. Shine*, 199 U. S. 62, 76, 50 L. ed. 90, 94, 25 S. C. 760); and so the period of limitation must be computed from the date of the overt act rather than the formation of the conspiracy. And where, during the existence of the conspiracy, there are successive overt acts, the period of limitation must be computed from the date of the last of them of which there is an appropriate allegation and proof, and this although some of the earlier acts may have occurred more than three years before the indictment was found. *Lorenz*

⁹ *United States v. Brace*, 149 Fed. 874.

¹⁰ *United States v. Stern*, 186 Fed. 854.

¹¹ *Ryan v. United States*, 217 Fed. 13, 132 C. C. A. 257 (7th Cir.).

¹² *Houston v. United States*, 217 Fed. 852, 856, 133 C. C. A. 562 (9th Cir.); *Dealy v. United States*, 152

U. S. 539, 38 L. ed. 545, 14 S. C. 680; *United States v. Barber*, 219 U. S. 72, 78, 55 L. ed. 99, 31 S. C. 209.

¹³ *Rabinowitz v. United States*, 222 Fed. 846, 138 C. C. A. 272 (2d Cir.); *United States v. Comstock*, 162 Fed. 416.

¹⁴ 179 Fed. 476, 103 C. C. A. 56 (8th Cir.).

v. United States, 24 App. D. C. 337, 387, s. c. 196 U. S. 640, 49 L. ed. 631, 25 Sup. Ct. Rep. 796; *Ware v. United States*, 154 Fed. 577, 84 C. C. A. 503 (8th Cir.); 12 L. R. A. (N. S.) 1053, 12 Ann. Cas. 233, s. c. 207 U. S. 588, 52 L. ed. 353, 28 Sup. Ct. Rep. 255; *Jones v. United States*, 162 Fed. 417, 89 C. C. A. 303 (9th Cir.); s. c. 212 U. S. 576, 53 L. ed. 657, 29 Sup. Ct. Rep. 685.”¹⁵ A conspiracy to defraud the public in the sale of corporate stock through the mails is a continuing offense, — it continues until the conspirators cease disposing of the stock or give up the scheme — and a prosecution therefor was held not barred until three years from the last overt act.¹⁶ Section 37 is not a revenue law, and prosecution for a conspiracy to defraud the United States of import duties is within the three years’ limitation.¹⁷ Where an alleged conspiracy to defraud the United States contemplated various overt acts, and consequently the continuation of the conspiracy beyond the commission of the first one, each overt act gives a new separate and distinct effect to the conspiracy, and constitutes another crime, and a prosecution is not barred until three years after the last overt act averred in the indictment.¹⁸

§ 1050. Evidence.

In a joint trial for conspiracy each defendant has the right to take the stand in his own behalf, and having done so, he is to be treated as any other witness.¹ As in other criminal cases, there must be an acquittal if on any reasonable hypothesis the jury can reconcile the evidence with the accused’s innocence. On the other hand, it is sufficient to warrant a conviction if upon consideration of all the evidence the jury are satisfied beyond a reasonable doubt of the guilt of the accused.² Under an indict-

¹⁵ *Brown v. Elliott*, 225 U. S. 392, 56 L. ed. 1136, 32 S. C. 812.

¹⁶ *Wilson v. United States*, 190 Fed. 427, 435, 111 C. C. A. 231 (2d Cir.); *United States v. Breese*, 173 Fed. 402.

¹⁷ *United States v. Hirsch*, 100 U. S. 33, 25 L. ed. 539.

¹⁸ *Jones v. United States*, 179 Fed. 584, 103 C. C. A. 142 (9th Cir.).

§ 1050. ¹ *Radin v. United States*, 189 Fed. 568, 576, 111 C. C. A. 6 (2d Cir.).

² *United States v. Richards*, 149 Fed. 443; *Davis v. United States*, 107 Fed. 753, 46 C. C. A. 619 (6th Cir.); *Reilley v. United States*, 106 Fed. 896, 46 C. C. A. 25 (6th Cir.); *United States v. Newton*, 52 Fed. 275; *United States v. Lancaster*,

ment charging a conspiracy to violate Section 215, the government has to bear a heavier burden of proof as to the intent than under a count charging violation of Section 215; it must prove not only intent to defraud but also to defraud by use of the mails.³ It is, of course, prejudicial error to instruct the jury on evidence tending to cause a conviction on charges not included in the indictment, or to admit such evidence.⁴ It has been held within the discretion of the court to admit evidence of acts by the defendants prior to the taking effect of the particular statute to show motive and intent, where they were closely connected with and were similar to subsequent acts, and where a similar statute was then in force.⁵ It is permissible to prove that the course of fraud was entered on long before the periods specified in the indictment and was kept up thereafter.⁶

§ 1051. Proof on Separate Trial.

On the separate trial of one defendant on an indictment against two for conspiring to defraud the United States, it was held that, before the jury could convict, they must find the defendant guilty beyond any reasonable doubt; and that the jury must find from the evidence (1) that the conspiracy as charged existed; (2) that the overt act charged was committed in furtherance of the conspiracy, and (3) that the defendant was one of the conspirators.¹ One's participation in a criminal conspiracy is not excused by showing that the service he was employed to render required or called for such participation.² One charged with conspiring with others may be convicted on proof of his conspiring with any of such others, without proof of a conspiracy participated in by all of them.³

44 Fed. 885; *United States v. Babcock*, 3 Dill. 581, Fed. Cas. No. 14487; *United States v. Cole*, 5 McLean, 513, Fed. Cas. No. 14832.

³ *Farmer v. United States*, 223 Fed. 903, 139 C. C. A. 341 (2d Cir.).

⁴ *Shea v. United States*, 236 Fed. 97, 149 C. C. A. 307 (6th Cir.).

⁵ *Jelke v. United States*, 255 Fed. 264, — C. C. A. — (7th Cir.).

⁶ *Heike v. United States*, 227 U. S. 131, 57 L. ed. 450, 33 S. C. 226.

§ 1051. ¹ *United States v. Newton*, 52 Fed. 275.

² *Hardy v. United States*, 256 Fed. 284, 288, — C. C. A. — (5th Cir.).

³ *Hardy v. United States*, 256 Fed. 284, 287, — C. C. A. — (5th Cir.). For notes dealing with the effect of overt acts upon the running of the statute of limitations, see 12 Ann. Cas. 242, and 12 L. R. A. (N. S.) 1053.

§ 1052. Circumstantial Evidence.

In conspiracy cases, the proof must, from the very nature of the charge, consist largely of circumstantial evidence. The government can infrequently find documentary proof of any unlawful combination to defraud it or violate its laws.¹

§ 1053. Proof of Similar Acts.

Proof of other acts of a similar character at or about the same time, and with the alleged fraudulent purpose, are admissible, to show intent only.¹ Acts which do not tend to effect the object of the conspiracy charged are inadmissible to prove the charge in the indictment.² When the government relies upon the circumstances to prove a conspiracy, an intent different from the ordinary criminal intent must be shown.³

§ 1054. Statements of Co-conspirators; When Admissible.

In all cases where a conspiracy is shown, the act of one conspirator in the prosecution of the enterprise is considered the act of all, and may be shown in evidence against all. But only those acts and declarations are admissible under this rule which are done and made while the conspiracy is pending, and in furtherance of its object. After the conspiracy has come to an end, either by success or by failure of the enterprise, the admissions of one conspirator by way of narration of past facts are not admissible in evidence against the others.¹ A co-conspirator is a competent witness on the trial of an indictment for con-

§ 1052. ¹ *Lawler v. Loewe*, 209 Fed. 721, — C. C. A. — (2d Cir.); *Jelke v. United States*, 255 Fed. 264, 280, — C. C. A. — (7th Cir.); *Marrash v. United States*, 168 Fed. 225, 229, 93 C. C. A. 511 (2d Cir.); *Alkon v. United States*, 163 Fed. 810, 812, 90 C. C. A. 116 (1st Cir.); *United States v. Lancaster*, 44 Fed. 896; *United States v. Hamilton*, Fed. Cas. No. 15288; *United States v. Cole*, 153 Fed. 801; *United States v. Howell*, 56 Fed. 21; *United States v. Breese*, 173 Fed. 402.

§ 1053. ¹ *Worden v. United States*, 204 Fed. 1, 5, 122 C. C. A. 315 (6th Cir.); *Roukous v. United States*,

195 Fed. 353, 115 C. C. A. 255 (1st Cir.); *Thomas v. United States*, 156 Fed. 897, 84 C. C. A. 477 (8th Cir.); *Van Gesner v. United States*, 153 Fed. 46, 82 C. C. A. 180 (9th Cir.).

² *Fain v. United States*, 209 Fed. 525, 126 C. C. A. 347 (8th Cir.).

³ *Fall v. United States*, 209 Fed. 547, 553, 126 C. C. A. 369 (8th Cir.).

§ 1054. ¹ *Logan v. United States*, 144 U. S. 263, 309, 36 L. ed. 429, 12 S. C. 617; *Brown v. United States*, 150 U. S. 93, 98, 37 L. ed. 1010, 14 S. C. 37; *Kansas City Star v. Carlisle*, 108 Fed. 344, 361, 47 C. C. A. 384 (8th Cir.); *Spencer v.*

spiracy.² When a severance has been granted, the evidence of a co-conspirator is admissible for the government, in the absence of statute, and its credibility is a matter for the jury.³ The evidence of persons already convicted of conspiracy and for which the defendant is also indicted is to be received with caution and suspicion, and is not entitled to the same weight as that given to ordinary witnesses.⁴ Facts which show that one of several alleged conspirators had conceived of fraudulent intent before he entered the conspiracy do not constitute competent evidence that his alleged co-conspirators, who had no knowledge of these facts, had such an intent before or at the time the conspiracy was formed.⁵ The testimony of an accomplice need not be corroborated in every part of the act which goes to make up the offense.⁶ A mere plea of guilty by a conspirator does not render him incompetent to testify against his co-conspirators. A judgment of conviction is necessary to effect that result.⁷ Where a conspiracy is charged, it is indispensable that in some way the existence of the alleged combination or agreement should be established by the testimony beyond a reasonable doubt.⁸ In a conspiracy to use the mails in furtherance of a scheme to defraud in violation of Section 215, the evidence introduced was held to sustain allegations of indictment.⁹ While the act of one conspirator in the prosecution of the enterprise is, after proof of the conspiracy, evidence against all, his admissions in his narration of past events after the conspiracy has come to an end either by success or failure are inadmissible in evidence against his co-conspirator.¹⁰ In a prosecution for conspiracy where the mails had been used, it was held

Read, 217 Fed. 508, 133 C. C. A. 360 (8th Cir.); *Richards v. United States*, 175 Fed. 911, — C. C. A. — (8th Cir.).

² *United States v. Sacia*, 2 Fed. 754.

³ *Wong Din v. United States*, 135 Fed. 702, 68 C. C. A. 340 (9th Cir.).

⁴ *Crawford v. United States*, 212 U. S. 183, 53 L. ed. 465, 29 S. C. 260.

⁵ *Miller v. United States*, 133 Fed. 337, 66 C. C. A. 399 (8th Cir.).

⁶ *United States v. Howell*, 56 Fed. 21.

⁷ *United States v. Wilson*, 60 Fed. 890.

⁸ *Prettyman v. United States*, 180 Fed. 30, 43, 103 C. C. A. 384 (6th Cir.).

⁹ *Elder v. United States*, 243 Fed. 84, 155 C. C. A. 614 (9th Cir.).

¹⁰ *Fain v. United States*, 209 Fed. 525, 126 C. C. A. 347 (8th Cir.); *Logan v. United States*, 144 U. S. 263, 309, 36 L. ed. 429, 12 S. C. 617; *Brown v. United States*, 150 U. S. 93, 98, 37 L. ed. 1010, 14 S. C. 37; *Lonabaugh v. United States*, 179 Fed. 476, 481, 103 C. C. A. 56 (8th Cir.).

that declarations made by one of the conspirators implicating the defendant, at a time when the conspiracy had ended and when two of the conspirators were in jail, the declarant having been subpoenaed to appear before the grand jury, were inadmissible as against the defendant, and letters identified by such declarant should not be received.¹¹ Where two or more persons are associated together for the same illegal purpose, any act or declaration of one of the parties in reference to the common object and forming a part of the *res gestæ*, may be given in evidence against the others.¹² After *prima facie* evidence of an unlawful combination has been introduced, the act of any one of the conspirators in furtherance of such combination may be properly given in evidence against all.¹³ The acts and declarations of persons not parties to the record are admissible against the defendants if it appears that they were made in carrying the conspiracy into effect, or attempting to carry it into effect.¹⁴ Declarations made by one conspirator while the conspiracy was in progress, and relating to its object, although not in furtherance thereof, are admissible as part of the *res gestæ* against each conspirator.¹⁵ Where the evidence did not establish the conspiracy, it was held that letters written by the accused's alleged co-conspirator, tending to show his guilt and participation in the conspiracy, were hearsay and inadmissible.¹⁶ A letter passing between the alleged conspirators other than the defendant has been held competent evidence to show a conspiracy and what the conspirators were doing.¹⁷

§ 1055. Evidence of Overt Acts.

The overt act is evidence that the conspiracy has passed beyond words and is on foot when the act is done.¹ Overt acts, other

¹¹ *Erber v. United States*, 234 Fed. 221, 148 C. C. A. 123 (2d Cir.).

¹² *American Fur Co. v. United States*, 2 Pet. (U. S.) 358, 365, 7 L. ed. 450; *Wiborg v. United States*, 163 U. S. 632, 657, 41 L. ed. 289, 16 S. C. 1127, 1197; *Fitzpatrick v. United States*, 178 U. S. 304, 314, 44 L. ed. 1078, 20 S. C. 944.

¹³ *Bannon & Mulkey v. United States*, 156 U. S. 464, 39 L. ed. 494, 15 S. C. 467.

¹⁴ *Clune v. United States*, 159 U. S. 590, 40 L. ed. 269, 16 S. C. 125.

¹⁵ *Jones v. United States*, 179 Fed. 584, 103 C. C. A. 142 (9th Cir.).

¹⁶ *Stager v. United States*, 233 Fed. 510, 147 C. C. A. 396 (2d Cir.).

¹⁷ *Stirlen v. United States*, 183 Fed. 302, 305, 105 C. C. A. 514 (7th Cir.).

§ 1055. ¹ *United States v. Baker*, 243 Fed. 741; *Hyde v. United States*, 225 U. S. 347, 56 L. ed. 1114, 32 S. C. 793.

than those charged in the indictment, tending to show the defendant guilty, are admissible as against the objections of irrelevancy.² Previous intimacy between persons charged with conspiracy has been held competent and important proof.³

§ 1056. Variance.

When the accused was indicted for conspiracy to rob a post office, evidence was held incompetent to show a general conspiracy, in which the accused participated, to rob banks and everything that could be robbed. The Government having relied upon a count charging a conspiracy which is restricted to one transaction, it was incumbent that the jury be satisfied beyond a reasonable doubt that the defendant entered into a conspiracy with intent to rob that particular post office.¹ On a charge of conspiracy, as in every other criminal case, the crime must be proved as laid in the indictment.² It has been held that there is not a fatal variance between indictment and proof in a prosecution for conspiracy where the indictment charges that the defendants conspired with each other and with others to the grand jurors unknown, while the evidence shows that the name of another conspirator was in fact known, where the indictment fully sets out his connection with the conspiracy, and designates him by name, so as clearly to advise the defendants of the charge against them.³ The conspiracy need not be proved as laid if proved to have existed before the happening of the overt act and continued till then.⁴ Conse-

² *McKnight v. United States*, 252 Fed. 687, 164 C. C. A. 527 (8th Cir.); *Houston v. United States*, 217 Fed. 852, 858, 133 C. C. A. 562 (9th Cir.); *United States v. Howell*, 56 Fed. 21; *United States v. Burkett*, 150 Fed. 208; *United States v. Eccles*, 181 Fed. 906; *Bannon & Mulkey v. United States*, 156 U. S. 464, 469, 39 L. ed. 494, 15 S. C. 467; *Heike v. United States*, 227 U. S. 131, 145, 57 L. ed. 450, 33 S. C. 226; *Huff v. United States*, 228 Fed. 892, 143 C. C. A. 290 (5th Cir.).

³ *United States v. Greene*, 146 Fed. 803.

§ 1056. ¹ *Rabens v. United States*,

146 Fed. 978, 77 C. C. A. 224 (4th Cir.).

² *Marrin v. United States*, 167 Fed. 951, 93 C. C. A. 351 (3d Cir.); *Rabens v. United States*, 146 Fed. 978, 77 C. C. A. 224 (4th Cir.); *United States v. Newton*, 52 Fed. 275; *United States v. Lancaster*, 44 Fed. 896; *Reg. v. Stell, C. & M.* 2 Moody, C. C. 246, 41 E. C. L. 187; *Reg. v. Hamilton*, 7 C. & P. 448, 32 C. C. L. 701.

³ *Jones v. United States*, 179 Fed. 584, 103 C. C. A. 142 (9th Cir.).

⁴ *Bradford v. United States*, 152 Fed. 616, 81 C. C. A. 606 (5th Cir.).

quently there is not a fatal variance between an indictment which charges both the conspiracy and the overt act in the state where the prosecution is had and proof that only the overt act was committed there, the conspiracy being entered into in another state.⁵ Under an indictment which charged the defendants with having conspired "before and on" a certain date, it was held that, while evidence of acts done after that date was inadmissible as direct proof of an act then done in furtherance of the conspiracy, it was competent as proof of acts done before or on said date.⁶ "Usually the same evidence proves the conspiracy and the substance; sometimes the substance is never reached, the criminal effort does not get so far, and conspiracy alone is proved; but to acquit of conspiracy and convict of substance, produces a condition requiring a scanning of the record to ascertain whether, under cover of the unsuccessful charge, the successful one (over due objection) has been bolstered up."⁷ It has been intimated in *Heike v. United States*,⁸ and in *United States v. Kissel*,⁹ that there may be an abuse of power in indicting for conspiracy and the substantive offense, but no remedy for same has thus far been pointed out.

§ 1057. Motions for New Trial and Writs of Error.

Ordinarily when two persons on trial for conspiracy have been found guilty, it is no error to refuse a new trial to one and grant it to the other,¹ but where it is impossible that one defendant should be guilty unless the other is equally guilty, a new trial must be granted to both.² The law was summed up by Judge Hough³ as follows: "Although the union of minds of at least two persons is a prerequisite to the commission of the crime of conspiracy, yet one may be convicted after the other accused is dead before conviction. Per Kent, J. *People v. Olcott*, 2 Johns. Cas. (N. Y.) at 310, 1 Am. Dec. 168. Yet not only if one of two conspirators

⁵ *Bernstein v. United States*, 238 Fed. 923, 151 C. C. A. 657 (4th Cir.).

⁶ *Browne v. United States*, 145 Fed. 1, 76 C. C. A. 31 (2d Cir.).

⁷ Per Hough, J. in *Hart v. United States*, 240 Fed. 911, 153 C. C. A. 597 (2d Cir.).

⁸ 227 U. S. 131, 57 L. ed. 450, 33 S. C. 226.

⁹ 173 Fed. 823.

§ 1057. ¹ *Browne v. United States*, 145 Fed. 1, 76 C. C. A. 31 (2d Cir.).

² *Feder v. United States*, 257 Fed. 694, — C. C. A. — (2d Cir.).

³ *Feder v. United States*, *supra*.

be acquitted must the other also be acquitted, but, even if the prosecutor enter a *nolle prosequi* as to one, the other must be acquitted. *State v. Jackson*, 7 S. C. 283, 24 Am. Rep. 476; *Commonwealth v. Edwards*, 135 Pa. 474, 19 Atl. 1064. And even where evidence tended to show that three defendants had conspired, and the jury declared that A had conspired with one of the other two, but they could not tell which one, it was held by Lord Campbell, C. J.: 'I think under these circumstances the verdict against A cannot be supported. It is conceded that, if there be an indictment against two persons for a conspiracy, the acquittal of one must invalidate the conviction of the other. I cannot draw a distinction between the cases of two or three persons, if one only is found guilty. If three are indicted and two found not guilty the third must also be acquitted.' *Reg. v. Thompson*, 16 Q. B. 832. The rule as to convictions in conspiracy may be summed up by saying that, provided the acquittal or death of co-conspirators does not remove the basis of the charge, one defendant may be convicted of the offense. *Cf. People v. Mather*, 4 Wend. (N. Y.) 229, 21 Am. Dec. 122; *People v. Richards*, 67 Cal. 412, 7 Pac. 828, 56 Am. Rep. 716, and cases *supra*. . . . While even in conspiracy a new trial has been granted to one of numerous defendants without disturbing the verdict against others (*Rex v. Mawbey*, 6 T. R. 619), the rule was formerly general that, if a new trial be given to one after a conviction for conspiracy, it is given to all who were found guilty. In *Reg. v. Gumpertz, et al.*, 9 Q. B. 482, Denman, C. J. said: 'We cannot grant a new trial to one conspirator without granting it to all who are convicted; as we cannot separate the defendants, there must be a new trial as to all.' This remark must be taken with the limitation above indicated, and indeed commented upon by Lord Denman's colleagues by referring to *Rex v. Mawbey, supra*. The rule is founded upon much reason, as was remarked in *Commonwealth v. McGowan*, 2 Pars. Eq. Cas. (Pa.) 341, a case which followed the Gumpertz decision, soon after the latter was rendered. It has been accepted by writers of authority. *Vide Wharton's Criminal Law* (10th Ed.), § 1395; *Bishop's New Criminal Procedure* (4th Ed.), § 1038. The reason for the rule is in our opinion the indivisibility of the crime for which a plurality

of defendants are tried. This perhaps is best illustrated by the application of it made in *Dutcher v. State*, 16 Neb. 30, 19 N. W. 612, where, because of error in respect of one of several defendants accused of tumultuous and unlawful assembling, a new trial was granted to all. The matter has received some consideration in this court. *United States v. Cohn* (C. C.), 128 Fed. 615, was an indictment for conspiracy against three men in respect of an agreement to defraud the United States made by them and 'others to the jurors unknown.' Two only of the defendants were brought to trial. The trial judge gave a new trial to one of them and denied it as to the other, who thereupon took a writ of error, reported as *Browne v. United States*, 145 Fed. 1, 76 C. C. A. 31 (*certiorari* refused 200 U. S. 618, 26 S. C. 755, 50 L. ed. 623). This point is considered at page 13, and holds in substance that the jury might well have convicted the one person ultimately held guilty for conspiring, not with the defendant to whom a new trial was awarded, but with the absent defendant named, and the 'persons to the jurors unknown.' "

§ 1058. Punishment.

There can be but one prosecution for conspiracy in violation of the conspiracy statute regardless of the number of overt acts committed in pursuance thereof.¹ Each overt act warrants a charge of conspiracy to commit it, so indictment therefor will not shield from subsequent indictment to commit another similar offense.² In a prosecution under Section 37 and Section 215, where the conspiracy counts set forth as overt acts the mailing of letters not set out in counts under Section 215, it was held that the contention that a conviction on the conspiracy counts as well as on the others is a double conviction was untenable.³ If a person convicted of a conspiracy cannot be held as a party to such conspiracy, that question is one that can only be corrected on a writ of error, sued out regularly to review the judgment of conviction and

§ 1058. ¹ *United States v. Brace*, 149 Fed. 874.

² *Francis v. United States*, 152 Fed. 155, 81 C. C. A. 407 (3d Cir.).

³ *Preeman v. United States*, 244

Fed. 1, 20, 156 C. C. A. 429 (7th Cir.), *citing*, *Ryan v. United States*, 216 Fed. 13, 132 C. C. A. 257 (7th Cir.).

not on a writ of *habeas corpus*.⁴ The dismissal and abandonment by the United States of an indictment for conspiracy will be a bar to an action under another statute for the same acts.⁵ Where a person, convicted for a conspiracy, is sentenced to imprisonment for a term longer than one year, the court may in its discretion direct his confinement in a state penitentiary.⁶ Where a defendant has been convicted on different counts of an indictment charging separate offenses for conspiracy, the court may impose separate and cumulative sentences upon the several counts, but a single sentence for a term longer than is authorized by the statute for one offense is void to the extent of the excess. Another court cannot cure the defect by apportioning the term upon the different counts; after serving the lawful part of the term the prisoner may be discharged on a writ of *habeas corpus*.⁷ Successive sentences may be imposed on conviction of several offenses in one indictment.⁸

⁴ Ex parte Lyman, 202 Fed. 303, citing In re Coy, 127 U. S. 731, 758, 32 L. ed. 274, 8 S. C. 1263.

⁵ United States v. Chouteau, 102 U. S. 603, 26 L. ed. 246.

⁶ Ex parte Karstendick, 93 U. S. 396, 23 L. ed. 889.

⁷ United States v. Peeke, 153 Fed. 166, 82 C. C. A. 340 (3d Cir.); Ex parte Peeke, 144 Fed. 1016.

⁸ In re Greenwald, 77 Fed. 590; Ex parte Peeke, *supra*.

CHAPTER LXII

USE OF MAILS TO PROMOTE FRAUDS

- § 1059. The Statute.
- § 1060. The Purpose and Interpretation of the Statute — Instances.
- § 1061. Application of Statute and Instances.
- § 1062. The Difference between Conspiracy and Substantive Offense.
- § 1063. Indictment — Requisites.
- § 1064. Limitations.
- § 1065. Evidence — Issue is Good Faith.
- § 1066. The Charge of the Court.
- § 1067. Verdict.

§ 1059. The Statute.

Section 215 of the Federal Criminal Code provides :

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, bank note, paper money, or any obligation or security of the United States, or of any State, Territory, municipality, company, corporation, or person, or anything represented to be or intimated or held out to be such counterfeit or spurious article, or any scheme or artifice to obtain money by or through correspondence, by what is commonly called the "saw-dust swindle", or "counterfeit-money fraud", or by dealing or pretending to deal in what is commonly called "green article", "green coin", "green goods", "bills", "paper goods", "spurious Treasury notes", "United States goods", "green cigars", or any other names or terms intended to be understood as relating to such counterfeit or spurious articles, shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or

cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, whether addressed to any person residing within or outside the United States, in any post-office, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the post-office establishment of the United States, or shall take or receive any such therefrom, whether mailed within or without the United States, or shall knowingly cause to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such letter, postal card, package, writing, circular, pamphlet, or advertisement, shall be fined not more than one thousand dollars, or imprisoned not more than five years, or both.¹

§ 1060. The Purpose and Interpretation of the Statute — Instances.

The prime purpose of the section is to prevent the prostitution of the mail services; protection of the public from frauds is incidental thereto. The gist of the offense is the improper use of the mails. While fraudulent design is essential, it is merely an element of the crime. The consummation of the crime is not dependent upon the success of the scheme; the crime is consummated when the mail is used to defraud.¹ It is sufficient to show an intent to defraud some one; it is no longer necessary to show an intent to use the mails to effect the scheme. The crime consists of two elements: a scheme intended to defraud and the actual use

§ 1059. ¹ Formerly Rev. Stat. § 5480, 35 Stat. L. § 1130. New section has been materially amended.

§ 1060. ¹ *Linn v. United States*, 234 Fed. 543, 148 C. C. A. 309 (7th Cir.); *Whitehead v. United States*, 245 Fed. 385, 157 C. C. A. 547 (5th Cir.); *Preeman v. United States*, 244 Fed. 1, 156 C. C. A. 429 (7th Cir.); *Schwartzberg v. United States*, 241 Fed. 348 (C. C. A. 2d Cir.); *Wilson v. United States*, 190 Fed. 427, 111 C. C. A. 231 (2d Cir.); *Mounday v. United States*, 225 Fed.

965, 140 C. C. A. 93 (8th Cir.); *Sandals v. United States*, 213 Fed. 569, 572, 130 C. C. A. 149 (6th Cir.); *United States v. Young*, 232 U. S. 155, 58 L. ed. 548, 34 S. C. 303; *Belden v. United States*, 223 Fed. 726, 139 C. C. A. 256 (9th Cir.); *Gould v. United States*, 209 Fed. 730, 733, 126 C. C. A. 454 (8th Cir.); *United States v. Wupperman*, 215 Fed. 135; *United States v. McCrory*, 175 Fed. 802; *Foster v. United States*, 178 Fed. 165, 101 C. C. A. 485 (6th Cir.).

of the mails.² The requirements of the old Section 5480 of the Revised Statutes of the United States were broader, making it necessary also to charge that the scheme was intended to be effected by opening or intending to open correspondence with some other person by means of the post office.³ It is not necessary that the scheme as alleged should appear to be of a fraudulent nature or calculated to deceive on its face. All that is necessary is that it be a scheme reasonably calculated to deceive persons of ordinary comprehension and prudence and that the mail service of the United States be used and intended to be used in its execution.⁴ The statute includes schemes to defraud by means of false representations and promises as to the future as well as false representations as to past or present conditions.⁵ The reason for the rule is stated by the Supreme Court of the United States,⁶ as follows: "But beyond the letter of the statute is the evil sought to be remedied, which is also significant in determining the meaning. It is common knowledge that nothing is more alluring than the expectation of receiving

² *United States v. Comyns & Byron*, 249 U. S. 349, — L. ed. —, 39 S. C. 126; *Depew v. United States*, 255 Fed. 539 (C. C. A. 9th Cir.); *Stern v. United States*, 223 Fed. 762, 139 C. C. A. 292 (2d Cir.); *Farmer v. United States*, 223 Fed. 903, 139 C. C. A. 341 (2d Cir.); *Trent v. United States*, 228 Fed. 648, 143 C. C. A. 170 (8th Cir.); *Freeman v. United States*, 244 Fed. 1, 156 C. C. A. 429 (7th Cir.); *Bowers v. United States*, 244 Fed. 641, 157 C. C. A. 89 (9th Cir.); *Lyman v. United States*, 241 Fed. 945, 154 C. C. A. 581 (9th Cir.); *Robbins v. United States*, 262 Fed. 126 (C. C. A. 8th Cir.).

³ *Gardner v. United States*, 230 Fed. 575, 144 C. C. A. 629 (8th Cir.); *United States v. Young*, 232 U. S. 155, 58 L. ed. 548, 34 S. C. 303; *Ex parte King*, 200 Fed. 622; *United States v. Maxey*, 200 Fed. 997; *Stockton v. United States*, 205 Fed.

462, 123 C. C. A. 530 (7th Cir.); *United States v. Goldman*, 207 Fed. 1002; *Badders v. United States*, 240 U. S. 391, 60 L. ed. 706, 36 S. C. 367; *Smith v. United States*, 208 Fed. 131, 125 C. C. A. 353 (8th Cir.). *See also* *Erbaugh v. United States*, 173 Fed. 433, 97 C. C. A. 663 (8th Cir.), holding that opening a correspondence with oneself is not within Section 5480.

⁴ *Oesting v. United States*, 234 Fed. 304, 148 C. C. A. 206 (9th Cir.); *Rumble v. United States*, 143 Fed. 772, 75 C. C. A. 30 (9th Cir.); *Rimmerman v. United States*, 186 Fed. 307, 108 C. C. A. 385 (8th Cir.); *United States v. Young*, 215 Fed. 267.

⁵ *Moffatt v. United States*, 232 Fed. 522, 146 C. C. A. 480 (8th Cir.); *Robbins v. United States*, *supra*.

⁶ *Durland v. United States*, 161 U. S. 313, 40 L. ed. 709, 16 S. C. 508.

large returns on small investments. Eagerness to take the chances of large gains lies at the foundation of all lottery schemes, and, even when the matter of chance is eliminated, any scheme or plan which holds out the prospect of receiving more than is parted with appeals to the cupidity of all. In the light of this the statute must be read, and so read it includes every thing designed to defraud by the representations as to the past or present, or suggestions and promises as to the future. . . . It was with the purpose of protecting the public against all such intentional efforts to despoil, and to prevent the post office from being used to carry them into effect, that this statute was passed; and it would strip it of value to confine it to such cases as disclose an actual misrepresentation as to some existing fact, and exclude those in which is only the allurements of a specious and glittering promise. . . .”⁷ But the court further held: “The significant fact is the intent and purpose. The question presented by this indictment to the jury was not, as counsel insist, whether the business scheme suggested in this bond was practicable or not. If the testimony had shown that this Provident company, and the defendant, as its president, had entered in good faith upon that business, believing that out of the moneys received they could by investment or otherwise make enough to justify the promised returns, no conviction could be sustained, no matter *how visionary* might seem the scheme. The charge is that in putting forth this scheme it was not the intent of the defendant to make an honest effort for its success, but that he resorted to this form and pretense of a bond without a thought that he or the company would ever make good its promises.” It is not essential to a conviction that false representations made to prospective purchasers should amount actually to a substantial deception.⁸ Exaggerations as to the size of the business or mere “puffing” are not ordinarily within the statute. In the case of *Faulkner v. United States*,⁹ the Court said: “Conceding that the scheme is sufficiently charged, there must be proof of it before the plaintiff in error

⁷ But see limitations on this statement in *American School of Magnetic Healing v. McAnnulty*, 187 U. S. 94, 47 L. ed. 90, 23 S. C. 33.

⁸ *Chambers v. United States*, 237 Fed. 513, 150 C. C. A. 395 (8th Cir.).

⁹ 157 Fed. 840, 841, 85 C. C. A. 204 (5th Cir.).

could be rightfully convicted. The evidence shows without conflict that Faulkner was in fact engaged in business as advertised by him. He had, in fact, a large business. There was uncontradicted evidence that he had made arrangements to secure and had secured a 'cold storage' place for perishable foods. There was conflict in the evidence as to the size of the place, but that seems to us immaterial. The fact is he was simply advertising his business, and, if the advertisement contains some exaggerations, that does not constitute a scheme to defraud. It was shown that he failed to settle with some few of his patrons, and he offered to prove that he settled with large numbers of those who placed products in his hands for sale. The fact that one who advertises a business fails to make settlements with some of his creditors, the advertisements being substantially true, does not sufficiently tend to show a scheme or artifice to defraud to make it a question to be submitted to the jury. If the plaintiff in error is guilty of embezzlement, he may be prosecuted for that offense under the laws of the state. After a close examination of all the evidence, which it would be entirely useless to copy into this opinion, we have reached the conclusion that there was no sufficient evidence before the jury to authorize the defendant's conviction of the offense charged. The charge requested by the plaintiff in error, directing the jury to acquit him, should have been given." The false representation consisted in the statement that the defendant had a cold air storage capacity of about 120 pounds fresh fish, 200 buckets of oysters, 500 cases of eggs, 500 pounds of poultry, 2000 pounds of butter, 300 crates of berries and vegetables; that the policy of the business was prompt service, immediate reports, accurate accounts and profitable results. Mere trickiness of method in carrying out an agreed-upon exchange of lands is not to be confused with a scheme to defraud under the section.¹⁰ In other words, the sole test or issue is the good faith or fraudulent intent of the defendant.¹¹ Promises and assurances that the stock would return dividends and be profitable, in the honest belief

¹⁰ *Stubbs v. United States*, 249 U. S. 571, 161 C. C. A. 497 (9th Cir.).

¹¹ *McDonald v. United States*, 241 Fed. 793, 154 C. C. A. 495 (6th Cir.);

Schwartzberg v. United States, 241 Fed. 348, 353, 154 C. C. A. 228 (2d Cir.); *Harrison v. United States*,

200 Fed. 662, 119 C. C. A. 78 (6th Cir.).

that the promises and assurance would be fulfilled, were not wrongful.¹² Representations by letters and circulars as to curative properties of article sold, with the intent to defraud as shown by defendant's knowledge is the vital issue.¹³ In *Miller v. United States*,¹⁴ the defendants were charged with a scheme to defraud which consisted of sending circulars through the mails falsely representing that a certain manufacturing company earned more than twenty per cent dividends on its capital stock; that it desired to establish branch selling houses and to employ managers at a stated salary; that they offered positions as sales managers to such persons that would be willing to buy at par a certain number of shares. The Court held that although the statements as to the dividends were false, nevertheless, inasmuch as at the time of the initiation of the scheme there was in fact a real manufacturing company in existence and in need of additional capital, a scheme to defraud was not made out; that a scheme to defraud is not made out by raising the expectations of gain or advantage which was not the intention of the defendants to fulfill. But the United States Circuit Court of Appeals for the Second Circuit in the case of *Wilson v. United States*,¹⁵ refused to follow the reasoning of the *Miller* case, *supra*. Where the scheme to defraud involved sending false statements of accused's financial condition to persons from whom he desired credit, the controlling consideration was the truth or falsity of the statements known to the accused.¹⁶ Any correspondence by mail for the purpose of carrying out a scheme to defraud may come within the act. A letter mailed defendants by their agent will do so.¹⁷ The scheme or artifice devised or intended to be devised must be one intended to defraud.¹⁸ The scheme to defraud need have no original relation to the laws of the United States, and the mere incidental or unpremeditated use of the mails may give to the

¹² *Menefee v. United States*, 236 Fed. 837 (C. C. A. 9th Cir.).

¹³ *Samuels v. United States*, 232 Fed. 536, 146 C. C. A. 494 (8th Cir.).

¹⁴ 174 Fed. 35, 98 C. C. A. 21 (7th Cir.).

¹⁵ 190 Fed. 427, 434, 111 C. C. A. 231 (2d Cir.).

¹⁶ *Kaplan v. United States*, 229 Fed. 389, 143 C. C. A. 509 (2d Cir.).

¹⁷ *Trent v. United States*, 228 Fed. 648, 143 C. C. A. 170 (8th Cir.).

¹⁸ *Stockton v. United States*, 205 Fed. 462, 123 C. C. A. 530 (7th Cir.).

federal courts the trial of any state law offense which involves defrauding another person.¹⁹ Congress may make each putting of a letter into the post office a separate offense. A punishment of five years' imprisonment and a fine of \$1000 on each of seven counts, relating to different letters, the periods being concurrent, not cumulative, is not unconstitutional as imposing cruel and unusual punishment and excessive fines.²⁰ The word "cause" is a word of very broad meaning and its meaning is generally known and embraces a case of a person who causes the mailing through the instrumentality of an innocent agent, in furtherance of a scheme to defraud.²¹

§ 1061. Application of Statute and Instances.

Where the scheme was devised prior to the going into effect of the Criminal Code, its continuance thereafter was a devising of a scheme under the section.¹ One indicted for using the mails to defraud subsequent to January 1, 1910, may be prosecuted within the section although the indictment charges the devising of the scheme in 1909.² United States Commissioners have no statutory authority to issue warrants to search and seize letters, etc., used, or intended to be used in violation of the statute.³ The offense is not to be confounded with the offense of obtaining money under false pretenses.⁴ The scheme may consist of making false pretenses as to solvency and the doing of a legitimate business for the purpose of obtaining property on credit without intending to pay therefor.⁵ The use of the mails, even after the money is received, for the purpose of assisting in retaining the money, or to convey to the victim assurances calculated to lull him into inaction is within the section.⁶ The placing of a catalogue in the mails by

¹⁹ *Hendrey v. United States*, 233 Fed. 5, 147 C. C. A. 75 (6th Cir.).

²⁰ *Badders v. United States*, 240 U. S. 391, 60 L. ed. 706, 36 S. C. 367.

²¹ *United States v. Kenofsky*, 243 U. S. 440, 61 L. ed. 836, 37 S. C. 438.

§ 1061. ¹ *Farmer v. United States*, 223 Fed. 903, 139 C. C. A. 341 (2d Cir.); *Myers v. United States*, 223 Fed. 919, 139 C. C. A. 399 (2d Cir.).

² *Sandals v. United States*, 213 Fed. 569, 130 C. C. A. 149 (6th Cir.).

³ *United States v. Jones*, 230 Fed. 262.

⁴ *Schwartzberg v. United States*, 241 Fed. 348, 154 C. C. A. 228 (2d Cir.); *Emanuel v. United States*, 196 Fed. 317, 322, 116 C. C. A. 137 (2d Cir.).

⁵ *United States v. Akers*, 232 Fed. 963.

⁶ *Preeman v. United States*, 244 Fed. 1, 156 C. C. A. 429 (7th Cir.); *Farmer v. United States*, 223 Fed. 903, 139 C. C. A. 341 (2d Cir.).

a manufacturer of loaded dice, marked playing cards, etc., designed to defraud persons induced to play with the owners thereof and directed to designated individuals is not within this section.⁷ The letter which is mailed need not be one to or from the intended victim of the fraud. It may be between the persons who concocted or entered into it.⁸ The defendants need not have known personally the persons named in the indictment as defrauded or intended to be defrauded.⁹ A fraudulent scheme by which defendants, through a corporation, intended to purchase lumber from manufacturers through the post office, with intent not to pay therefor, is within the section.¹⁰ Mailing a false financial statement to a commercial agency with the knowledge that it was false and that it would be used to secure the extension of credit to him is within the section.¹¹ A scheme to corrupt an election, involving the placing of a large number of letters in the post office in its execution is within the section.¹² The mailing to intended victims "as one of the contestants" in an easy puzzle contest of a letter containing a "purchase check" of \$125 applicable on "sale price" of \$187 of piano regularly listed by factory to sell for \$250 where the evidence showed the price was marked up to meet the discount was held within the section.¹³ The scheme to defraud condemned by the section is not confined to devices by which it is intended that the customer shall receive nothing for his money.¹⁴ False representations as to the financial condition of a bank are within the section.¹⁵ A scheme to induce persons to deposit money for treasury stock in a corporation,

⁷ *Stockton v. United States*, 205 Fed. 462, 123 C. C. A. 530 (7th Cir.).

⁸ *Freeman v. United States*, 244 Fed. 1, 156 C. C. A. 429 (7th Cir.).

⁹ *Bonfoey v. United States*, 252 Fed. 802, 164 C. C. A. 642 (8th Cir.).

¹⁰ *Ex parte King*, 200 Fed. 622; *Schwartzberg v. United States*, 241 Fed. 348, — C. C. A. — (2d Cir.).

¹¹ *Scheinberg v. United States*, 213 Fed. 757, 130 C. C. A. 271 (2d Cir.).

¹² *United States v. Aczel*, 219 Fed. 917.

¹³ *Sprinkle v. United States*, 244 Fed. 111, 156 C. C. A. 539 (4th Cir.).

¹⁴ *Sparks v. United States*, 241 Fed. 777, 154 C. C. A. 479 (6th Cir.); *Harris v. Rosenberger*, 145 Fed. 449, 455, 76 C. C. A. 225 (8th Cir.); *Wilson v. United States*, 190 Fed. 427, 432, 111 C. C. A. 231 (2d Cir.); *Freeman v. United States*, 244 Fed. 1, 17, 156 C. C. A. 429 (7th Cir.); *Bettman v. United States*, 224 Fed. 819, 140 C. C. A. 265 (6th Cir.).

¹⁵ *Sparks v. United States*, 241 Fed. 777, 154 C. C. A. 479 (6th Cir.); *McDonald v. United States*, 241 Fed. 793, 154 C. C. A. 495 (6th Cir.).

where the intention was to deliver therefor personal stock of the promoters, is a fraud within the section.¹⁶ A scheme to sell through the mails a device called an oxyopathor or false representations as to its effect is within the section.¹⁷ It is not necessary to show that the device was entirely worthless as a cure for diseases.¹⁸ Others having through a fraudulent scheme obtained checks and drafts from victims, one who deposited them for collection with a bank, which in process of collection transmitted them through the mails, made the bank his innocent agent and violated the section, collection being essential to the full consummation of the fraud.¹⁹ A written order sent through the mails to manufacturing chemists for drugs to be used in the fraudulent sale of a compound under the name of a rare and high priced drug, is within the section.²⁰ Where a local agent of a life insurance company, whose duty it was to verify claims of death and certify and deliver the proofs and certificates to the company's local superintendent, so certified and delivered a false claim proof and certificates for the purpose of defrauding the company, knowing that they would be mailed by the superintendent to the company's home office it was held that the agent "caused" the mailing within the section.²¹ An article alone is not necessarily the inducement and compensation for its purchase. It is in the use to which it may be put, the purpose it may serve; and there is deception and fraud when the article is not of the character represented and does not serve its purpose. When the representations which execute the fraud are false they become the scheme denounced by the statute.²² Misrepresentation as to ownership

¹⁶ *Myers v. United States*, 223 Fed. 919, 139 C. C. A. 399 (2d Cir.).

¹⁷ *Moses v. United States*, 221 Fed. 863, 137 C. C. A. 433 (2d Cir.).

¹⁸ *Ibid.*

¹⁹ *Spear v. United States*, 246 Fed. 250, 158 C. C. A. 410 (8th Cir.); *Spear v. United States*, 228 Fed. 485, 143 C. C. A. 67 (8th Cir.); *United States v. Kenofsky*, 243 U. S. 440, 61 L. ed. 836, 37 S. C. 438; *Shea v. United States*, 251 Fed. 440, 163 C. C. A. 458 (6th Cir.).

²⁰ *Edwards v. United States*, 249 Fed. 686, 161 C. C. A. 596 (6th Cir.).

²¹ *United States v. Kenofsky*, 243 U. S. 440, 61 L. ed. 836, 37 S. C. 438.

²² *United States v. New South Farm and Home Co.*, 241 U. S. 64, 60 L. ed. 890, 36 S. C. 505; *Colburn v. United States*, 223 Fed. 590, 139 C. C. A. 136 (8th Cir.); *Wilson v. United States*, 190 Fed. 427, 111 C. C. A. 231 (2d Cir.).

and character of Mexican lands, of which defendant disposed when he did not have title, is within the section.²³ It was also held that taking letters from post office box in reply to an advertisement for a woman to assist accused in a financial proposition which was in fact a scheme to extort money from business men was within the section.²⁴ There are also a number of cases dealing with medical or mental healing frauds. Thus, a scheme by physicians offering treatment without regard to the needs of patients was held to be a scheme to defraud.²⁵ Seeking by use of the mails to obtain whisky from another by means of checks which accused knew would not be paid for want of funds is within the section.²⁶ A scheme to sell pretended "soldiers' " scrip or evidence of soldiers' additional homestead entry rights and using the mails in aid thereof, is within the section.²⁷ A scheme to defraud by means of false pretenses is within the section,²⁸ even though used in the prosecution of an established business, legitimate if honestly conducted.²⁹ The fact that a company was lawfully organized as a corporation and its chartered purpose was a legitimate business does not prevent it being made the vehicle of a scheme to defraud, there being evidence that, when the company was organized, stock sold and the mails used, the accused had in view to defraud stockholders.³⁰

§ 1062. The Difference between Conspiracy and Substantive Offense.

In order to convict for conspiracy to violate Section 215 of the Federal Criminal Code, it must appear from the evidence that all of the defendants conspired to use the mail for the purpose of

²³ *Bowers v. United States*, 244 Fed. 641, 157 C. C. A. 89 (9th Cir.).

²⁴ *Goldman v. United States*, 220 Fed. 57, 135 C. C. A. 625 (6th Cir.).

²⁵ *Hughes v. United States*, 231 Fed. 50, 145 C. C. A. 238 (5th Cir.); *United States v. Baxter*, 221 Fed. 473.

²⁶ *Charles v. United States*, 213 Fed. 707, 130 C. C. A. 221 (4th Cir.).

²⁷ *Blanton v. United States*, 213 Fed. 320, 130 C. C. A. 22 (8th Cir.).

²⁸ *Sparks v. United States*, 241 Fed. 777, 154 C. C. A. 479 (6th Cir.);

United States v. Stever, 222 U. S. 167, 174, 56 L. ed. 145, 32 S. C. 51.

²⁹ *Sparks v. United States*, 241 Fed. 777, 154 C. C. A. 479 (6th Cir.); *Foster v. United States*, 178 Fed. 165, 172, 101 C. C. A. 485 (6th Cir.); *Harris v. Rosenberger*, 145 Fed. 449, 76 C. C. A. 225 (8th Cir.); *Bettman v. United States*, 224 Fed. 819, 824, 140 C. C. A. 265 (6th Cir.).

³⁰ *Watlington v. United States*, 233 Fed. 247, 147 C. C. A. 253 (8th Cir.).

carrying out a scheme to defraud. A mere conspiracy to defraud without an agreement to use the mails for that purpose is insufficient and such proof cannot be gathered from mere inference.¹ Two or four defendants who have pleaded guilty of conspiracy cannot testify as to intent; their own intent not being in issue, and they could only infer that of their co-defendants.² The offense under Section 215 is not to be confounded with the offense of obtaining money under false pretenses.³ That defendants conspired to commit an offense under Section 37 and Section 215, and that it was a part of said conspiracy to accomplish it by the mails and to place and cause to be placed in the post office letters addressed to persons intended to be defrauded, two letters thus mailed being set out was held to be sufficient.⁴ Where the execution of the scheme would have been impossible without the use of the mails, all who participated in the scheme would be guilty, though some did not actually deposit or take from the mails any letters.⁵ Causing another to deposit specified letters in post office is an act within the statute.⁶ In counts under Sections 37 and 215 it is necessary only to set forth generally the scheme or artifice which the defendants devised, and to charge the use of the mails in execution of the scheme. The scheme itself is not required to be charged with the detail and particularity necessary in an indictment for the specific offense of obtaining property through false representations.⁷ The charges that an offense was committed under this section and also under Section 37 may be joined under Revised Statutes Section 1024.⁸ A letter written by one de-

§ 1062. ¹ *Schwartzberg v. United States*, 241 Fed. 348, 154 C. C. A. 228 (2d Cir.); *Farmer v. United States*, 223 Fed. 903, 139 C. C. A. 341 (2d Cir.).

² *Cooper v. United States*, 232 Fed. 81, 146 C. C. A. 273 (2d Cir.).

³ *Schwartzberg v. United States*, *supra*; *Emanuel v. United States*, 196 Fed. 317, 322, 116 C. C. A. 737 (2d Cir.).

⁴ *McKelvey v. United States*, 241 Fed. 801, 154 C. C. A. 503 (9th Cir.).

⁵ *Freeman v. United States*, 244 Fed. 1, 156 C. C. A. 429 (7th Cir.);

Chambers v. United States, 237 Fed. 513, 150 C. C. A. 395 (8th Cir.); *Blanton v. United States*, 213 Fed. 320, 130 C. C. A. 22 (8th Cir.); *Shea v. United States*, 251 Fed. 440, 163 C. C. A. 458 (6th Cir.).

⁶ *Rose v. United States*, 227 Fed. 357, 142 C. C. A. 53 (8th Cir.).

⁷ *Le More v. United States*, 253 Fed. 887 (C. C. A. 5th Cir.); *Preeman v. United States*, 244 Fed. 1, 156 C. C. A. 429 (7th Cir.).

⁸ *Freeman v. United States*, *supra*; *Sidebotham v. United States*, 253 Fed. 417, — C. C. A. — (9th Cir.).

fendant to another during the alleged execution of the scheme and when it did not appear that he knew any prosecution was contemplated, tending to show good faith in attempting to bring the project to a successful conclusion, was held admissible as *res gestæ*.⁹ In a prosecution for conspiracy to purchase goods on credit through a fictitious company, dispose of them and retain the proceeds without payment, one of the conspirators testified that letters to their dupes were sent out every week, and that defendant was a party thereto. It was held that correspondence between defendant and those firms from whom he and the fictitious company purchased was admissible to show he knew of their existence; but it was improper to show defendant had not paid for goods he purchased for himself, that being a separate transaction.¹⁰ Where the alleged conspiracy was at an end, declarations by one conspirator then under subpoena to appear before the grand jury were held not admissible against his alleged co-conspirators.¹¹ A telegram by a co-conspirator to another victim of fake horse race betting scheme the day after he lost his money was held admissible as part of the *res gestæ*.¹² The fact that some defendants had a very small part in wrongdoing does not warrant a new trial where the charge is of the same nature.¹³ An indictment is sufficient under this section if it alleges a scheme to defraud the public by means of misrepresentations fully set forth.¹⁴

§ 1063. Indictment — Requisites.

There is now no restriction as to the number of counts the indictment may contain or as to the period within which the separate offenses charged must have been committed.¹ A description of the offense is absolutely necessary. The purpose of requiring a description of the scheme to defraud in the indictment is to

⁹ Gould v. United States, 209 Fed. 730, 126 C. C. A. 454 (8th Cir.).

¹⁰ Erber v. United States, 234 Fed. 221, 148 C. C. A. 123 (2d Cir.).

¹¹ *Ibid.*

¹² Shea v. United States, 251 Fed. 440, 163 C. C. A. 458 (6th Cir.).

¹³ Schwartzberg v. United States, 241 Fed. 348, 154 C. C. A. 228 (2d Cir.).

¹⁴ Crane v. United States, 259 Fed. 480, — C. C. A. — (9th Cir.).

§ 1063. ¹ Stern v. United States, 223 Fed. 762, 139 C. C. A. 292 (2d Cir.).

definitely and clearly inform the accused of the scheme charged against him so as to enable him to make his defense.² It follows that one must be convicted, if at all, on the scheme as alleged and if the scheme as alleged is not substantially established by the proof, he cannot be convicted.³ Under the new section all that is now essential is that, for the purpose of carrying into execution the scheme or artifice, a letter or other writing be sent through or taken from the post office establishment.⁴ It is not necessary to allege a conspiracy, although two or more may be jointly charged.⁵ But it is not error to do so, where the evidence offered tends to show that one existed.⁶ It is not necessary to allege that the scheme is to be effected through and by the use of the United States mails. It is sufficient to allege that the mails have actually been used.⁷ A count in an indictment which advises defendant with reasonable certainty of the nature of the accusation he has to meet is sufficient.⁸ An indictment is sufficient under this section if it alleges a scheme to defraud people by means of misrepresentations fully set forth which was to be effected through the use of the mails.⁹ An indictment for using the mails to defraud was held insufficient in the absence of an averment showing the use of the mails prior to the consummation of the alleged fraud.¹⁰ An indictment charging the use of the mails in aid of a scheme to obtain money through the medium of alleged divine healing, well knowing their claims were false, was sustained though

² *Brooks v. United States*, 146 Fed. 223, 76 C. C. A. 581 (8th Cir.); *Stewart v. United States*, 119 Fed. 89, 55 C. C. A. 631 (8th Cir.); *United States v. Hess*, 124 U. S. 483, 31 L. ed. 516, 8 S. C. 571.

³ *Brown v. United States*, 146 Fed. 219, 76 C. C. A. 577 (8th Cir.).

⁴ *Belden v. United States*, 223 Fed. 726, 139 C. C. A. 256 (9th Cir.).

⁵ *Ibid.*

⁶ *Ibid.*

⁷ *Ruthven v. United States*, 222 Fed. 70, 137 C. C. A. 364 (5th Cir.); *Bartell v. United States*, 227 U. S. 427, 57 L. ed. 583, 33 S. C. 383; *United States v. Young*, 232 U. S.

155, 58 L. ed. 548, 34 S. C. 303; *United States v. Young*, 215 Fed. 267.

⁸ *Linn v. United States*, 234 Fed. 543, 148 C. C. A. 309 (7th Cir.); *Stern v. United States*, 223 Fed. 762, 139 C. C. A. 292 (2d Cir.); *United States v. Farmer*, 218 Fed. 929; *Spear v. United States*, 228 Fed. 485, 143 C. C. A. 67 (8th Cir.); *Finnegan v. United States*, 231 Fed. 561, 145 C. C. A. 447 (6th Cir.); *Bettman v. United States*, 224 Fed. 819, 140 C. C. A. 265 (6th Cir.).

⁹ *Crane v. United States*, 259 Fed. 480, — C. C. A. — (9th Cir.).

¹⁰ *United States v. Dale*, 230 Fed. 750.

mental healing is good.¹¹ An indictment which properly stated an offense under § 5480, which was in force when the offense was committed, was not rendered invalid by the fact that it was also sufficient to state an offense under § 215, carrying a heavier penalty.¹² The Government is not confined to particular instruments of fraud and particular proposed victims in the first instance; it is sufficient to allege that in the execution of a scheme of general features particular instruments and particular victims were developed.¹³ The mailing of the letter or other article must be pleaded with great certainty as to time, place, and circumstance.¹⁴ The letter, etc., deposited in the mail should be set out if possible, or sufficiently identified and described; but it is not necessary to allege just how it would or was intended to aid in executing the scheme or artifice.¹⁵ The particulars of the scheme need not be pleaded with all the certainty as to the time, place, and circumstances requisite in charging the gist of the offense, the mailing of the letter in execution or attempted execution of the scheme was held to be a sufficient description of a scheme by which defendants would "pretend" certain things.¹⁶ "Letter" held to include envelope containing only post office money order.¹⁷ The indictment must contain a sufficient description of letter, such as a statement of place of mailing, contents, amount of post office order contained therein, addressee and his post office address, payee of money order and date he took it from post office.¹⁸ Scheme to defraud "divers ignorant persons" in three named States without naming or describing them or stating that their names are to the grand jurors unknown, was held sufficiently

¹¹ *United States v. Schlatter*, 235 Fed. 381.

¹² *Wilson v. United States*, 190 Fed. 427, 111 C. C. A. 231 (2d Cir.).

¹³ *United States v. Farmer*, 218 Fed. 929.

¹⁴ *Colburn v. United States*, 223 Fed. 590, 139 C. C. A. 136 (8th Cir.).

¹⁵ *United States v. Wupperman*, 215 Fed. 135.

¹⁶ *McClendon v. United States*, 229 Fed. 523, 143 C. C. A. 591 (8th Cir.); *Colburn v. United States*,

223 Fed. 590, 139 C. C. A. 136 (8th Cir.); *Preeman v. United States*, 244 Fed. 1, 156 C. C. A. 429 (7th Cir.); *Gardner v. United States*, 230 Fed. 575, 144 C. C. A. 629 (8th Cir.); *Gould v. United States*, 209 Fed. 730, 126 C. C. A. 454 (8th Cir.); *Mounday v. United States*, 225 Fed. 965, 140 C. C. A. 93 (8th Cir.).

¹⁷ *Finnegan v. United States*, 231 Fed. 561, 145 C. C. A. 447 (6th Cir.).

¹⁸ *Ibid.*

described as a scheme to defraud, not an individual, or group of individuals, but a class.¹⁹ A charge that defendant and others devised a scheme to subdivide and sell tracts of practically worthless land in small tracts for orchard purposes, and carried it out by means of letters, circulars and copies of photographs sent through the mails, which fraudulently misrepresented the location, character and value of the land, sufficiently states an offense.²⁰ An indictment is not fatally defective because it does not allege the scheme with the particularity which would be necessary if the scheme were the gist of the offense.²¹ The statute does not require that the indictment should charge that the letters were "knowingly" deposited in the mail.²² Where the indictment shows the joint participation of the defendants in the offense charged, they are not entitled to separate trials.²³ A violation of the right of open and fair dealing is a broad but justifiable description of the offense; therefore evidence must always be admissible to show exactly what the dealing was which is claimed to be neither open nor fair.²⁴ In proceedings for using the mails in aid of a scheme to defraud in connection with the disposal of loan company stock, letters by stockholders to the company seeking information regarding its affairs while the scheme was in progress, was held admissible.²⁵ An allegation that the public generally was to be defrauded is sufficient, without stating the names of the persons it was intended to defraud.²⁶

§ 1064. Limitations.

A prosecution is not barred because the scheme was devised more than three years prior to the filing of the indictment, where the overt acts were committed within that time, and testimony as

¹⁹ *Finnegan v. United States*, 231 Fed. 561, 145 C. C. A. 447 (6th Cir.).

²⁰ *Riddell v. United States*, 244 Fed. 695, 157 C. C. A. 143 (9th Cir.).

²¹ *Gould v. United States*, 209 Fed. 730, 126 C. C. A. 454 (8th Cir.).

²² *Samuels v. United States*, 232 Fed. 536, 146 C. C. A. 494 (8th Cir.).

²³ *Belden v. United States*, 223

Fed. 726, 139 C. C. A. 256 (9th Cir.).
See also SEPARATE TRIALS.

²⁴ *Hart v. United States*, 240 Fed. 911, 153 C. C. A. 597 (2d Cir.);
Wilson v. United States, 190 Fed. 427, 434, 111 C. C. A. 231 (2d Cir.).

²⁵ *Watlington v. United States*, 233 Fed. 247, 147 C. C. A. 253 (8th Cir.).

²⁶ *Gould v. United States*, 209 Fed. 730, 126 C. C. A. 454 (8th Cir.).

to events occurring prior to the three years are in such circumstances admissible.¹

§ 1065. Evidence — Issue is Good Faith.

In a prosecution under § 215 where the principal issue is that of good faith, the defendant may introduce in evidence letters and documents upon which he relied without proving the authenticity thereof. In *Harrison v. United States*,¹ the Circuit Court of Appeals for the Sixth Circuit said: "If the highly laudatory statements in the advertising as to the capacity, performance, and merits of the washer were made by the respondent in the belief that they were true, that belief would be a complete defense, however inaccurate the statements might turn out to be. His belief on this subject at the time of forming or continuing the scheme was, therefore, a controlling question. To support the claim that he believed what he said, his counsel offered to show that certain testimonial or commendatory letters received in the regular course of the business had been selected by his subordinates and shown to him, and that these letters contained statements that the machine did everything claimed for it. There are said to be over a thousand of these letters. The offer was many times repeated in varying forms, and it seems to be the claim of the respondent that he was the executive head of this large business; that he did not, ordinarily, see the correspondence; that, by his instructions, testimonial letters were selected and brought to him, and some of them used as the basis of his advertising; but that complaining letters (a great many of which it was conceded were received) were attended to by his subordinates, and he never saw them, unless in exceptional instances. Objection was made to the proof that these testimonial letters were shown to respondent, the objection being on the ground that the writing of the letters was not properly proved; and this resulted in a ruling that the admissibility of the letters depended on the showing that they were received in due course of business

§ 1064. ¹ *Bowers v. United States*, 244 Fed. 641, 157 C. C. A. 89 (9th Cir.); *Mitchell v. United States*, 196 Fed. 874, 877, 116 C. C. A. 436 (9th Cir.). See also *Riddell v.*

United States, 244 Fed. 695, 157 C. C. A. 143 (9th Cir.).

§ 1065. ¹ 200 Fed. 673, 119 C. C. A. 78.

and constituted a part of the regular conduct of the business, and that, therefore, the entire course of business must be shown—in other words, that the defendant could introduce these letters only if he would put in all the letters received, which he refused to do. We think this ruling rests on a misapprehension as to the ground on which the letters were receivable. If they were in fact laid before respondent as and for genuine letters, and if he believed them so to be, and in that belief acted on them, these things bore on his intent. It was not necessary first to show that they were signed by the writers, or mailed by the writers, or that their recitations of fact were true. In the ordinary case involving the admission of letters, it is these things which are of primary importance; but here the primary question was whether Harrison saw these letters, and believed them to be genuine correspondence, and on them based his statements. Whether it is credible that respondent knew of the testimonials, but not of the complaints, and whether, in connection with all these circumstances, such testimony sufficiently supported his alleged belief, were for the jury.” This case was referred to in the recent case of *Dr. M’Lean Medicine Co. v. United States*,² where the Court said: “If these letters had related to the statements made, and has been seen by the defendant’s manager, and he believed them to be genuine, and in that belief he had put forth the statements in issue, they would have been admissible on the question of intent, without proof of their execution, or of the truth of their subject-matter. *Harrison v. United States*, 200 Fed. 662, 119 C. C. A. 78; 4 *Chamb. on Evidence*, § 2649. As none of the testimonials are contained in the bill of exceptions, we cannot say that they were pertinent to the particular statements of defendant in issue, and they were not material in any event on this record, because the witness did not testify that he relied upon them.” In *Hair v. United States*,³ decided by the Circuit Court of Appeals for the Seventh Circuit, the Court said: “Of the essence of any such alleged criminal scheme or artifice is the intent to defraud. If this be wanting, there is no such scheme or artifice, and no crime. Letters of the nature of those which were excluded, coming to the attention of the defendants before the time of the alleged

² 253 Fed. 694, 697.

³ 240 Fed. 336, 337, — C. C. A. —.

offense, and reasonably capable of inducing or confirming or strengthening faith in the excellence and efficiency of the product, are admissible under such charge, on the question whether the representations charged and proved were made in good faith or with intent to defraud. *Hibbard v. United States*, 172 Fed. 66, 96 C. C. A. 554, 18 Ann. Cas. 1040; *Harrison v. United States*, 200 Fed. 662, 119 C. C. A. 78; *Gould, et al. v. United States*, 209 Fed. 730, 126 C. C. A. 454; *Patterson v. United States*, 222 Fed. 599, 138 C. C. A. 123. Indeed, the admissibility of evidence such as that excluded is not seriously controverted on behalf of the Government, but it is earnestly insisted that on the trial the Government conceded that these dry extinguishers were efficient to put out fires, and that therefore there was no error in ruling out this evidence; and that in any event in view of such concession by the Government, together with the fact that some evidence was admitted to like effect as that which was excluded, no possible harm came to defendants through the exclusion. Charged with willfully and fraudulently misrepresenting the efficiency and the value and salability of the product, and at least one witness for the Government having testified in support of that charge, it was the right of the defendants to have their evidence in exculpation fully adduced before the jury, and they should not have been required in lieu of such right to accept the concession of the district attorney on a proposition so material and important to the defense. This is particularly true in view of the fact that the concession of the Government does not appear to be as broad as the charge or the evidence thereunder." An accused may testify directly to the absence of fraudulent intent and motive on his part.⁴ Papers pertinent to the issue are admissible though illegally taken from defendants' possession.⁵ Where a seizure of a defendant's books and papers was illegally made, without warrant, and subsequently returned to him, secondary evidence gleaned from such documents offered in subsequent prosecution for using the mails to defraud was held incompetent, and a con-

⁴ *Sparks v. United States*, 241 Fed. 777, 791, 154 C. C. A. 479 (6th Cir.).

⁵ *Lyman v. United States*, 241 Fed. 945, 154 C. C. A. 581 (9th Cir.).

But see Weeks v. United States, 232 U. S. 383, 58 L. ed. 652, 34 S. C. 341; *Flagg v. United States*, 233 Fed. 481, 147 C. C. A. 367 (2d Cir.).

viction based thereon was reversed.⁶ Proved copies of letters mailed to accused are admissible, without otherwise accounting for the absence of the originals.⁷ Books, letters, checks, papers and documents, offered by defendants in a mass, without specifying which might be material, were held properly excluded.⁸ Evidence that physicians' assistants, in sending out letters to patients offering treatment without regard to their needs, showing their connection with the scheme to be that of employees, who performed their duties because of their salaries and not otherwise, was held to be consistent with their innocence.⁹ Evidence that a letter was caused to be mailed by defendant and placed in a rental box at the post office to which it was addressed, from which it was obtained by the addressee, was held sufficient evidence of delivery by mail.¹⁰ Letters sent by defendant through the mails in response to decoy letters of post office inspectors are admissible.¹¹ That letters taken from a post office box by accused were decoy letters did not render the act less an offense if the postal officials acted on reasonable grounds in an effort to detect, not to induce, the commission of a crime.¹² The fact that only fictitious transactions based on decoy letters were in evidence and that no money was shown to have been received by defendants does not prevent the jury from inferring a conspiracy and a fraudulent scheme.¹³ A Grand Jury investigating the guilt of a party, an officer of a corporation, for violation of this statute, may compel him to produce the corporation's books by a subpoena *duces tecum* without *ad testificandum* clause.¹⁴ Generally, evidence of other similar offenses is inadmissible,¹⁵ but it has been held that similar offenses

⁶ *Flagg v. United States*, 233 Fed. 481, 147 C. C. A. 367 (2d Cir.).

⁷ *Trent v. United States*, 228 Fed. 648, 143 C. C. A. 170 (8th Cir.).

⁸ *McDuffie v. United States*, 227 Fed. 961, 142 C. C. A. 419 (5th Cir.).

⁹ *Hughes v. United States*, 231 Fed. 50, 145 C. C. A. 238 (5th Cir.).

¹⁰ *Moffatt v. United States*, 232 Fed. 522, 146 C. C. A. 480 (8th Cir.).

¹¹ *Samuels v. United States*, 232 Fed. 536, 146 C. C. A. 494 (8th Cir.).

¹² *Goldman v. United States*, 220 Fed. 57, 135 C. C. A. 625 (6th Cir.); *Freeman v. United States*, 243 Fed. 353, 156 C. C. A. 133 (9th Cir.).

¹³ *Hughes v. United States*, 231 Fed. 50, 145 C. C. A. 238 (5th Cir.).

¹⁴ *Wheeler v. United States*, 226 U. S. 478, 57 L. ed. 309, 33 S. C. 158.

¹⁵ *Marshall v. United States*, 197 Fed. 511, 117 C. C. A. 17 (2d Cir.). but, *compare Scheinberg v. United States*, 213 Fed. 757, 130 C. C. A. 271 (2d Cir.).

may be proven to show intent.¹⁶ Instances of frauds of exactly the same sort as those charged in the indictment committed by one or more of the defendants prior to the going into effect of the Criminal Code are admissible to show intent.¹⁷ Evidence of other similar advertisements and false claims by defendant besides those in the letters set out in the indictment is admissible on the question of fraudulent intent.¹⁸ The extent of the admissibility of the evidence to establish the existence of a scheme to defraud rests largely in the discretion of the trial judge.¹⁹ Books, papers, letters and documents unlawfully seized must be returned, though they contain incriminating evidence.²⁰ Where one of four defendants has testified without objection that he has pleaded guilty, the prosecuting attorney may comment on that fact.²¹ The questions whether a scheme to defraud was devised by the defendant and carried out by the use of the mails are questions of fact, and if there is evidence to sustain a verdict of guilty the court will not reverse the judgment.²² It was held that the limiting of the number of witnesses, testifying to facts tending to show the good faith of defendants charged with using the mails to defraud, to thirteen, although many more were tendered, was within the discretion of the court, where their testimony was cumulative.²³

§ 1066. The Charge of the Court.

An instruction telling the jury that before they can convict the

¹⁶ *McKelvey v. United States*, 241 Fed. 801, 154 C. C. A. 503 (9th Cir.); *Trent v. United States*, 228 Fed. 648, 143 C. C. A. 170 (8th Cir.); *Bettman v. United States*, 224 Fed. 819, 140 C. C. A. 265 (6th Cir.); *Tucker v. United States*, 224 Fed. 833, 140 C. C. A. 279 (6th Cir.); *Stern v. United States*, 223 Fed. 762, 139 C. C. A. 292 (2d Cir.); *McDonald v. United States*, 241 Fed. 793, 800, 154 C. C. A. 495 (6th Cir.); *Edwards v. United States*, 249 Fed. 686, 161 C. C. A. 596 (6th Cir.); *Shea v. United States*, 251 Fed. 440, 163 C. C. A. 458 (6th Cir.); *Colt v. United States*, 190 Fed. 305, 111 C. C. A. 205 (8th Cir.).

¹⁷ *Farmer v. United States* 223 Fed. 903, 139 C. C. A. 341 (2d Cir.); *Myers v. United States*, 223 Fed. 919, 139 C. C. A. 399 (2d Cir.).

¹⁸ *Samuels v. United States*, 232 Fed. 536, 146 C. C. A. 494 (8th Cir.).

¹⁹ *Hendrey v. United States*, 233 Fed. 5, 147 C. C. A. 75 (6th Cir.).

²⁰ *United States v. Mounday*, 208 Fed. 186.

²¹ *Cooper v. United States*, 232 Fed. 81, 146 C. C. A. 273 (2d Cir.).

²² *Cooper v. United States*, 232 Fed. 81, 146 C. C. A. 273 (2d Cir.).

²³ *Chapa v. United States*, 261 Fed. 775, — C. C. A. — (— Cir.).

jury must find that the defendant knew the scheme to be false and his representations untrue, sufficiently covered a requested charge on behalf of the defendant that an honest belief by defendant of the truth of his statements was a defense.¹ The jury should be instructed on the element of good faith. A significant element is the intent and purpose. The mere fact that a scheme is visionary does not necessarily make it fraudulent.² Under this section a charge is sufficient which tells the jury that the defendants may be convicted if they had devised a scheme or artifice to defraud, and for the purpose of executing such scheme had deposited or caused to be deposited in the specified post office the letters and circulars mentioned in the indictment.³ The jury must be charged that a conviction cannot be had unless they believe beyond a reasonable doubt that the particular letter mentioned in the counts was mailed or received by mail.⁴ It is improper for the Court to charge the jury that the scheme was bound to fail and the Court cannot restrict the defense of good faith.⁵ The significant fact is the intent, and a conviction may be had if false and fraudulent representations are made notwithstanding that defendants might have been confident that they could make a success of the enterprise.⁶ Mere exaggeration of the merits of goods offered for sale, within reasonable bounds, is not within the section.⁷ Although each evidentiary fact need not be proved beyond a reasonable doubt, the essential constituent elements of the offense, such as the contriving of a scheme to defraud substantially as charged and the use of the mails must be so proved.⁸

§ 1066. ¹ *Mackenzie v. United States*, 209 Fed. 289, 126 C. C. A. 215 (3d Cir.).

² *Durland v. United States*, 161 U. S. 306, 40 L. ed. 709, 16 S. C. 508; *Sandals v. United States*, 213 Fed. 569, 130 C. C. A. 149 (6th Cir.).

³ *Gardner v. United States*, 230 Fed. 575, 144 C. C. A. 629 (8th Cir.); *United States v. Young*, 232 U. S. 155, 58 L. ed. 548, 34 S. C. 303.

⁴ *Hart v. United States*, 240 Fed. 911, 153 C. C. A. 597 (2d Cir.).

⁵ *Sandals v. United States*, 213 Fed. 569, 130 C. C. A. 149 (6th Cir.); *Rudd v. United States*, 173 Fed. 912, — C. C. A. — (8th Cir.); *Starr v. United States*, 153 U. S. 614, 38 L. ed. 841, 14 S. C. 919.

⁶ *Menefee v. United States*, 236 Fed. 826, 837, 150 C. C. A. 88 (9th Cir.).

⁷ *Harrison v. United States*, 200 Fed. 662, 119 C. C. A. 78 (6th Cir.).

⁸ *Spear v. United States*, 228 Fed. 485, 143 C. C. A. 67 (8th Cir.).

§ 1067. **Verdict.**

Where several counts each charged the mailing of a letter, but on different dates, an acquittal on some of the counts does not negative the charge of having on a prior date devised the scheme to defraud.¹ Acquittal on one count does not prevent a conviction on another count charging another offense.² A defendant may be convicted under counts which do not set out the fraudulent scheme in detail, but refer to the scheme as set out in the first count.³

§ 1067. ¹ *Lyman v. United States*, 241 Fed. 945, 154 C. C. A. 581 (9th Cir.).

² *Tucker v. United States*, 224 Fed. 833, 140 C. C. A. 279 (6th Cir.).

³ *Riddell v. United States*, 244 Fed. 695, 157 C. C. A. 143 (9th Cir.); *Linn v. United States*, 234 Fed. 543, 148 C. C. A. 309 (7th Cir.).

CHAPTER LXIII

OFFENSES AGAINST PRESIDENT OF THE UNITED STATES

§ 1068. Threats against the President of the United States by Mail or Otherwise.

§ 1068. Threats against the President of the United States by Mail or Otherwise.

The Statute provides :

“ Any person who knowingly and willfully deposits or causes to be deposited for conveyance in the mail or for delivery, from any post office or by any letter carrier any letter, paper, writing, print, missive, or document containing any threat to take the life of or to inflict bodily harm upon the President of the United States, or who knowingly and willfully otherwise makes any such threat against the President, shall upon conviction be fined not exceeding \$1000 or imprisoned not exceeding five years, or both.”¹

An indictment under this section charging that the defendant “ did unlawfully, knowingly, and willfully make a threat against the President, to wit : a threat to take the life of or to inflict bodily harm upon the said the President of the United States, said threat being then and there uttered and spoken by the said Pemberton W. Stickrath in words and substance as follows, to wit : ‘ President Wilson ought to be killed. It is a wonder some one has not done it already. If I had an opportunity, I would do it myself ’—contrary to the form of the statute”, etc., was sustained.² It was also held that this Act applies only to threats made against him in his official capacity.³

§ 1068. ¹ Act of Feb. 14, 1917, c. 64, 39 Stat. L. 919.

³ United States v. Metzdorf, 252 Fed. 933.

² United States v. Stickrath, 242 Fed. 151.

CHAPTER LXIV

FOOD AND DRUG ACTS

- § 1069. Pure Food and Drugs. (*See also* Oleomargarine, Chapter LXXXVIII.)
- § 1070. Inspection — Marking — Regulations.
- § 1071. False Labeling of Dairy and Food Products.
- § 1072. Penalty for Violation — Jurisdiction.
- § 1073. Prevention of the Manufacture, Sale or Transportation of Adulterated or Misbranded Foods, Drugs, Medicines, and Liquors.
- § 1074. Interstate, etc., Commerce of Adulterated or Misbranded Goods Prohibited.
- § 1075. Rules and Regulations to Be Made — Scope.
- § 1076. Chemical Examinations — Notice of Result — Certificate of Violations to District Attorney.
- § 1077. Legal Proceedings.
- § 1078. Definition — “Drugs” — “Food.”
- § 1079. Adulterations — Definition.
- § 1080. Misbranding — Definition.
- § 1081. Contents — Guaranty from Manufacturer.
- § 1082. Seizure of Original Packages in Interstate and Foreign Commerce — Disposal.
- § 1083. Examination of Imported Food and Drugs — Admission Denied Adulterated or Misbranded Goods — Destruction — Bond Required — Charges.
- § 1084. Insular Possessions Included — “Person” Defined — Liability of Corporations, etc.
- § 1085. Effect.

§ 1069. Pure Food and Drugs.

The first law for the regulation of food and drugs was passed by Congress in 1902.¹ Section One of this Act provides as follows:

That all articles known as oleomargarine, butterine, imitation, process, renovated, or adulterated butter, or imitation cheese, or any substance in the semblance of butter or cheese

§ 1069. ¹ Act of May 9, 1902, c. 784.

not the usual product of the dairy and not made exclusively of pure and unadulterated milk or cream, transported into any State or Territory or the District of Columbia, and remaining therein for use, consumption, sale, or storage therein, shall, upon the arrival within the limits of such State or Territory or the District of Columbia, be subject to the operation and effect of the laws of such State or Territory or the District of Columbia, enacted in the exercise of its police powers, to the same extent and in the same manner as though such articles or substances had been produced in such State or Territory or the District of Columbia, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise.²

This Act was held to be constitutional and the courts will not inquire into the motives of Congress in enacting it.³ Monthly returns as to the manufacture of oleomargarine on blanks furnished by the Internal Revenue Bureau are not such public records as to make them admissible as public documents.⁴ Under this Act every person who colors oleomargarine for the use and consumption of others is a manufacturer, unless he does it for his own table.⁵ Congress by this Act did not intend to empower any person to remove the marks, labels, and stamps from process or renovated butter.⁶

§ 1070. Inspection — Marking — Regulations.

Section 5 provides as follows :

All parts of an Act providing for an inspection of meats for exportation, approved August thirtieth, eighteen hundred and ninety, and of an Act to provide for the inspection of live cattle, hogs and the carcasses and products thereof which are the subjects of interstate commerce, approved March third, eighteen hundred and ninety-one, and of amendment thereto approved March second, eighteen hundred and ninety-five, which are applicable to

² 32 Stat. L. 194.

³ *McCray v. United States*, 195 U. S. 27, 49 L. ed. 78, 24 S. C. 769.

⁴ *United States v. Elder*, 232 Fed. 267. See also Chapter LXXXVIII. OLEOMARGARINE.

⁵ *Hartman v. United States*, 168 Fed. 30, 94 C. C. A. 124 (6th Cir.). See also Chapter LXXXVIII. OLEOMARGARINE.

⁶ *United States v. Green*, 137 Fed. 179.

the subjects and purposes described in this section shall apply to process or renovated butter. And the Secretary of Agriculture is hereby authorized and required to cause a rigid sanitary inspection to be made, at such times as he may deem proper or necessary, of all factories and store-houses where process or renovated butter is manufactured, packed, or prepared for market, and of the products thereof and materials going into the manufacture of the same. All process or renovated butter and the packages containing the same shall be marked with the words "Renovated Butter" or "Process Butter" and by such other marks, labels or brands and in such manner as may be prescribed by the Secretary of Agriculture, and no process or renovated butter shall be shipped or transported from its place of manufacture into any other State or Territory or the District of Columbia, or to any foreign country, until it has been marked as provided in this section. The Secretary of Agriculture shall make all needful regulations for carrying this section into effect, and shall cause to be ascertained and reported from time to time the quantity and quality of process or renovated butter manufactured, and the character and the condition of the material from which it is made. And he shall also have power to ascertain whether or not materials used in the manufacture of said process or renovated butter are deleterious to health or unwholesome in the finished product, and in case such deleterious or unwholesome materials are found to be used in product intended for exportation or shipment into other States or in the course of exportation or shipment he shall have power to confiscate the same. Any person, firm, or corporation violating any of the provisions of this section shall be deemed guilty of a misdemeanor and on conviction thereof shall be punished by a fine of not less than fifty dollars nor more than five hundred dollars or by imprisonment not less than one month nor more than six months, or by both said punishments, in the discretion of the court.¹

This section applies also to corporations and in no way limits the scope of the courts in enforcing the various sections of the

§ 1070. ¹ Act of May 9, 1902, c. 784, 32 Stat. L. 196.

Act.² Section Five has been held to refer to “process or renovated butter” and the marking and branding thereof prior to transportation.³

§ 1071. False Labeling of Dairy and Food Products.

Shortly after the passage of the above Act, Congress passed another Act, the first section of which provides as follows:

That no person or persons, company or corporation, shall introduce into any State or Territory of the United States or the District of Columbia from any other State or Territory of the United States or the District of Columbia, or sell in the District of Columbia or in any Territory any dairy or food products which shall be falsely labeled or branded as to the State or Territory in which they are made, produced or grown, or cause or procure the same to be done by others.¹

This Act is one of a series regulating transportation. It concerns itself especially with prohibiting the introduction from state to state of dairy products which have been falsely branded or labeled.² Labeling goods as made in one state but which have actually been made in another state is a violation of this section.³

§ 1072. Penalty for Violation — Jurisdiction.

Section 2 provides as follows:

That if any person or persons violate the provisions of this Act, either in person or through another, he shall be guilty of a misdemeanor and shall be punished by a fine of not less than five hundred nor more than two thousand dollars; and that the jurisdiction for the prosecution of said misdemeanor shall be within the district of the United States court in which it is committed.¹

² *United States v. Union Supply Company*, 215 U. S. 50, 54 L. ed. 87, 30 S. C. 15; *United States v. Pacific Live Stock Company*, 192 Fed. 443; *United States v. Braun & Fitts*, 158 Fed. 456.

³ *United States v. Bohl*, 125 Fed. 625; *United States v. Green*, 137 Fed. 179.

§ 1071. ¹ Act of July 1, 1902, c. 1357, 32 Stat. L. 632.

² *United States v. Hoke*, 187 Fed. 992.

³ 24 Ops. Atty.-Gen. 695.

§ 1072. ¹ Act of July 1, 1902, c. 1357, 32 Stat. L. 632.

§ 1073. Prevention of the Manufacture, Sale or Transportation of Adulterated or Misbranded Foods, Drugs, Medicines and Liquors.

Several years later, Congress passed an Act the first section of which reads as follows:

That it shall be unlawful for any person to manufacture within any Territory or the District of Columbia any article of food or drug which is adulterated or misbranded, within the meaning of this Act; and any person who shall violate any of the provisions of this section shall be guilty of a misdemeanor, and for each offense shall, upon conviction thereof, be fined not to exceed five hundred dollars or shall be sentenced to one year's imprisonment, or both such fine and imprisonment, in the discretion of the court, and for each subsequent offense and conviction thereof shall be fined not less than one thousand dollars or sentenced to one year's imprisonment, or both such fine and imprisonment, in the discretion of the court.¹

The constitutionality of the Act has been generally conceded and is well established.² The statute upon its face shows that the primary purpose of Congress was to prevent injury to the public health by the sale and transportation in interstate commerce of misbranded and adulterated foods.³ While maintaining their police power the states may not enact legislation in conflict with this statute.⁴

§ 1074. Interstate, etc., Commerce of Adulterated or Misbranded Goods Prohibited.

Section 2 provides as follows:

That the introduction into any State or Territory or the District of Columbia from any other State or Territory

§ 1073. ¹ Act of June 30, 1906, c. 3915, 34 Stat. L. 768.

² *McDermott v. Wisconsin*, 228 U. S. 115, 57 L. ed. 754, 33 S. C. 431; *United States v. Sweet Valley Wine Company*, 208 Fed. 85; *United States v. Seventy-Four Cases Grape Juice*, 181 Fed. 629; *United States v. Four Hundred and Twenty Sacks of Flour*, 180 Fed. 518.

³ *Armour v. North Dakota*, 240 U. S. 510, 60 L. ed. 771, 36 S. C. 440;

United States v. Lexington Mill, etc. Co., 232 U. S. 399, 58 L. ed. 658, 34 S. C. 337; *United States v. Antikamnia Chemical Co.*, 231 U. S. 654, 58 L. ed. 419, 34 S. C. 222; *Savage v. Jones*, 225 U. S. 501, 56 L. ed. 1182, 32 S. C. 715. *United States v. Watson-Durand-Kasper Grocery Co.*, 251 Fed. 310.

⁴ *McDermott v. Wisconsin*, 228 U. S. 115, 57 L. ed. 754, 33 S. C. 431.

or the District of Columbia, or from any foreign country, or shipment to any foreign country of any article of food or drugs which is adulterated or misbranded, within the meaning of this Act, is hereby prohibited; and any person who shall ship or deliver for shipment from any State or Territory or the District of Columbia to any other State or Territory or the District of Columbia, or to a foreign country, or who shall receive in any State or Territory or the District of Columbia from any other State or Territory or the District of Columbia, or foreign country, and having so received, shall deliver, in original unbroken packages, for pay or otherwise, or offer to deliver to any other person, any such article so adulterated or misbranded within the meaning of this Act, or any person who shall sell or offer for sale in the District of Columbia or the Territories of the United States any such adulterated or misbranded foods or drugs, or export or offer to export the same to any foreign country, shall be guilty of a misdemeanor, and for such offense be fined not exceeding two hundred dollars for the first offense, and upon conviction for each subsequent offense not exceeding three hundred dollars or be imprisoned not exceeding one year, or both, in the discretion of the court: *Provided, That* no article shall be deemed misbranded or adulterated within the provisions of this Act when intended for export to any foreign country and prepared or packed according to the specifications or directions of the foreign purchaser when no substance is used in the preparation or packing thereof in conflict with the laws of the foreign country to which said article is intended to be shipped; but if said article shall be in fact sold or offered for sale for domestic use or consumption, then this proviso shall not exempt said article from the operation of any of the other provisions of this Act.¹

Officers of a corporation who either permit or cause the violation of this section are subject to prosecution.² Offenses under this Act are prosecuted by indictment or information.³ The indictment

§ 1074. ¹ Act of June 30, 1906, c. 3915, 34 Stat. L. 768.

² United States v. Mayfield, 177 Fed. 765.

³ United States v. Weeks, 225

Fed. 1017; United States v. Watson-Durand-Kasper Grocery Co., 251 Fed. 310; United States v. Hopkins, 228 Fed. 173; United States v. Wells, 225 Fed. 320.

must set forth facts sufficient to make out an offense under the statute.⁴ Suitable objection before the trial must be taken to the defects in the verification of an information.⁵ This being a criminal statute, all possible pleas are either in abatement, in bar, or the general issue.⁶ The present three-year statute of limitations applies to prosecutions brought under this Act.⁷ Interpreted according to section seven "adulterated" as used in this section with reference to drugs is construed as meaning drugs sold under a name recognized in the United States Pharmacopœia but differing therein from the strength, labeling, etc., and food is "adulterated" where it contains poisonous and deleterious ingredients.⁸ In a libel, the Government is not limited to the standards mentioned in the Agricultural Department Circular No. 19 and Bulletin No. 65.⁹ The jury cannot pass upon the degree of sweetness in deciding the adulteration of macaroons.¹⁰ Adulteration is a question for the jury.¹¹

§ 1075. Rules and Regulations to Be Made — Scope.

Section 3 provides as follows:

That the Secretary of the Treasury, the Secretary of Agriculture, and the Secretary of Commerce and Labor shall make uniform rules and regulations for carrying out the provisions of this Act, including the collection and examination of specimens of foods and drugs manufactured or offered for sale in the District of Columbia, or in any Territory of the United States, or which shall be offered for sale in unbroken packages in any State other than that in which they shall have been respectively manufactured

⁴ *United States v. St. Louis Coffee Mills*, 189 Fed. 191; *Schraubstadter v. United States*, 199 Fed. 568, 118 C. C. A. 42 (9th Cir.).

⁵ *Abbott Bros. Co. v. United States*, 242 Fed. 751, 155 C. C. A. 339 (7th Cir.).

⁶ *United States v. J. L. Hopkins & Co.*, 228 Fed. 173.

⁷ *United States v. Hopkins*, 199 Fed. 649.

⁸ *McDermott v. Wisconsin*, 228 U. S. 115, 57 L. ed. 754, 33 S. C. 431.

⁹ *United States v. One Hundred Barrels of Vinegar*, 188 Fed. 471; *United States v. Frank*, 189 Fed. 195. *Contra*: *United States v. St. Louis Coffee Mills*, 189 Fed. 191.

¹⁰ *F. B. Washburn & Co. v. United States*, 224 Fed. 395, 140 C. C. A. 81 (1st Cir.).

¹¹ *Glaser v. United States*, 224 Fed. 84, 139 C. C. A. 566 (7th Cir.); *Shawnee Mill Co. v. Temple*, 179 Fed. 517.

or produced, or which shall be received from any foreign country, or intended for shipment to any foreign country, or which may be submitted for examination by the chief health, food, or drug officer of any State, Territory, or the District of Columbia, or at any domestic or foreign port through which such product is offered for interstate commerce, or for export or import between the United States, and any foreign port or country.¹

Under this section the court held that an information filed by the United States Attorney under the sanction of his official oath and without verification is sufficient.² The power of the secretaries is one of regulation, an administrative power only, but their power does not go so far as to permit them to alter or add to the act.³

§ 1076. Chemical Examinations — Notice of Result — Certificate of Violations to District Attorney.

Section 4 provides as follows :

That the examinations of specimens of foods and drugs shall be made in the Bureau of Chemistry of the Department of Agriculture, or under the direction and supervision of such Bureau, for the purpose of determining from such examinations whether such articles are adulterated or misbranded within the meaning of this Act ; and if it shall appear from any such examination that any of such specimens is adulterated or misbranded within the meaning of this Act, the Secretary of Agriculture shall cause notice thereof to be given to the party from whom such sample was obtained. Any party so notified shall be given an opportunity to be heard, under such rules and regulations as may be prescribed as aforesaid, and if it appears, that any of the provisions of this Act have been violated by such party, then the Secretary of Agriculture shall at once certify the facts to the proper United States District Attorney, with a copy of the results of the analysis or the examination of such article duly authenticated by the analyst or officer making such examination, under the oath

§ 1075. ¹ Act of June 30, 1906, c. 3915, 34 Stat. L. 768.

² United States v. Schallinger Produce Co., 230 Fed. 290.

³ United States v. Antikamnia Chemical Co., 231 U. S. 654, 666, 58 L. ed. 419, 34 S. C. 222.

of such officer. After judgment of the court, notice shall be given by publication in such manner as may be prescribed by the rules and regulations aforesaid.¹

The hearing before the Department of Agriculture is not judicial and there is no provision for compelling the attendance of the party from whom the sample was received.²

§ 1077. Legal Proceedings.

Section 5 provides as follows :

That it shall be the duty of each district attorney to whom the Secretary of Agriculture shall report any violation of this Act, or to whom any health or food or drug officer or agent of any State, Territory, or the District of Columbia shall present satisfactory evidence of any such violation, to cause appropriate proceedings to be commenced and prosecuted in the proper courts of the United States, without delay, for the enforcement of the penalties as in such case herein provided.¹

An information filed by the United States Attorney under the sanction of his official oath, and without verification, is sufficient.² The Department of Agriculture has the duty of making the investigation, and the report thereof is acted upon by the District Attorney without the presentation of evidence required in other cases.³

§ 1078. Definition — “ Drugs ” — “ Food.”

Section 6 provides as follows :

That the term “ drug ”, as used in this Act, shall include all medicines and preparations recognized in the United States Pharmacopœia or National Formulary for internal or external use, and any substance or mixture of substances intended to be used for the cure, mitigation, or prevention of

§ 1076. ¹ Act of June 30, 1906, c. 3915, 34 Stat. L. 769.

² United States v. Morgan, 222 U. S. 274, 56 L. ed. 198, 32 S. C. 81; United States v. American Laboratories, 222 Fed. 104.

§ 1077. ¹ Act of June 30, 1906, c. 3915, 34 Stat. L. 769.

² United States v. Schallinger Produce Co., 230 Fed. 290.

³ United States v. Seventy-Five Barrels Vinegar, 192 Fed. 350; United States v. Twenty Cases Grape Juice, 189 Fed. 331, 111 C. C. A. 63 (2d Cir.).

disease of either man or other animals. The term "food", as used herein, shall include all articles, used for food, drink, confectionery, or condiment by man or other animals, whether simple, mixed, or compound.¹

Wine is a food within the meaning of this section,² and milk being shipped into another State to have the impurities removed is also such a food.³ Whether a compound or mixture constitutes a drug is a question of fact. It may be a drug regardless of the fact that the National Formulary or Pharmacopœia did not class it as such.⁴

§ 1079. Adulterations — Definition.

Section 7 provides as follows:

That for the purposes of this Act an article shall be deemed to be adulterated: In case of drugs: First, If, when a drug is sold under or by a name recognized in the United States Pharmacopœia or National Formulary, it differs from the standard of strength, quality, or purity, as determined by the test laid down in the United States Pharmacopœia or National Formulary official at the time of investigation: *Provided, That* no drug defined in the United States Pharmacopœia or National Formulary shall be deemed to be adulterated under this provision if the standard of strength, quality or purity be plainly stated upon the bottle, box or other container thereof although the standard may differ from that determined by the test laid down in the United States Pharmacopœia or National Formulary. Second. If its strength or purity fall below the professed standard or quality under which it is sold. In the case of confectionery: If it contain terra alba, barytes, talc, chrome yellow, or other mineral substance or poisonous color or flavor, or other ingredient deleterious or detrimental to health, or any vinous, malt, or spirituous liquor or compound or narcotic drug. In the case of food: First. If any substance has been mixed and packed with it so as to reduce or lower or injuriously affect its quality

§ 1078. ¹ Act of June 30, 1906, c. 3915, 34 Stat. L. 769.

² United States v. Sweet Valley Wine Company, 208 Fed. 85.

³ Union Dairy Company v. United

States, 250 Fed. 231, 162 C. C. A. 367 (9th Cir.).

⁴ United States v. Frank, 189 Fed. 195.

or strength. Second. If any substance has been substituted wholly or in part for the article. Third. If any valuable constituent of the article has been wholly or in part abstracted. Fourth. If it be mixed, colored, powdered, coated, or stained in a manner whereby damage or inferiority is concealed. Fifth. If it contain any added poisonous or other added deleterious ingredient which may render such article injurious to health: *Provided, That* when in the preparation of food products for shipment they are preserved by any external application applied in such manner that the preservative is necessarily removed mechanically, or by maceration in water, or otherwise, and directions for the removal of said preservative shall be printed on the covering or the package, the provisions of this Act shall be construed as applying only when said products are ready for consumption. Sixth. If it consists in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance, or any portion of an animal unfit for food, whether manufactured or not, or if it is the product of a diseased animal, or one that has died otherwise than by slaughter.¹

Where the evidence is conflicting as to whether an added ingredient is poisonous, the jury must decide the question.² This section, along with Section 8, is admittedly difficult of construction.³ The Government has the burden of establishing that the added poisonous or deleterious substances are such as will render the article injurious to health.⁴ The standard of food is fixed by the Department of Agriculture.⁵

§ 1080. Misbranding — Definition.

Section 8 provides as follows:

That the term "misbranded", as used herein, shall apply to all drugs or articles of food or articles which enter into the composition of food, the package or label of which

§ 1079. ¹ Act of June 30, 1906, c. 3915, 34 Stat. L. 769.

² United States v. Forty Barrels, etc., 241 U. S. 265, 60 L. ed. 995, 36 S. C. 573.

³ Weeks v. United States, 224 Fed. 64, 139 C. C. A. 626 (2d Cir.).

⁴ United States v. Lexington Mill Etc. Co., 232 U. S. 399, 58 L. ed. 658, 34 S. C. 337.

⁵ United States v. Frank, 189 Fed. 195.

shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular, and to any food or drug product which is falsely branded as to the State, Territory, or country in which it is manufactured or produced. That for the purposes of this Act an article shall also be deemed to be misbranded. In case of drugs: First. If it be an imitation of or offered for sale under the name of another article. Second. If the contents of the package as originally put up shall have been removed, in whole or in part, and other contents shall have been placed in such package, or if the package fail to bear a statement on the label of the quantity or proportion of any alcohol, morphine, opium, cocaine, heroin, alpha or beta eucaine, chloroform, cannabis indica, chloral hydrate, or acetanilide, or any derivative or preparation of any substances contained therein. Third. If its package or label shall bear or contain any statement, design, or device regarding the curative or therapeutic (*sic*) effect of such article or any of the ingredients or substances therein, which is false and fraudulent. In the case of food: First. If it be an imitation of or offered for sale under the distinctive name of another article. Second. If it be labeled or branded so as to deceive or mislead the purchaser, or purport to be a foreign product when not so, or if the contents of the package as originally put up shall have been removed in whole or in part and other contents shall have been placed in such package, or if it fail to bear a statement on the label of the quantity or proportion of any morphine, opium, cocaine, heroin, alpha or beta eucane (*sic*), chloroform, cannabis indica, chloral hydrate, or acetanilide, or any derivative or preparation of any of such substances contained therein. Third. If in package form, the quantity of the contents be not plainly and conspicuously marked on the outside of the package in terms of weight, measure or numerical count: *Provided, however*, That reasonable variations shall be permitted, and tolerances and also exemptions as to small packages shall be established by rules and regulations made in accordance with the provisions of section three of this Act. Fourth. If the package containing it or its label shall bear any

statement, design, or device regarding the ingredients or the substances contained therein, which statement, design, or device shall be false or misleading in any particular: *Provided, That* an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded in the following cases: First. In the case of mixtures or compounds which may be now or from time to time hereafter known as articles of food, under their own distinctive names, and not an imitation of or offered for sale under the distinctive name of another article, if the name be accompanied on the same label or brand with a statement of the place where said article has been manufactured or produced. Second. In the case of articles labeled, branded, or tagged, so as to plainly indicate that they are compounds, imitations, or blends and the word "compound", "imitation", or "blend", as the case may be, is plainly stated on the package in which it is offered for sale: *Provided, That* the term blend as used herein shall be construed to mean a mixture of like substances, not excluding harmless coloring or flavoring ingredients used for the purpose of coloring and flavoring only: *And provided further, That* nothing in this Act shall be construed as requiring or compelling proprietors or manufacturers of proprietary foods which contain no unwholesome added ingredients to disclose their trade formulas, except in so far as the provisions of this Act may require to secure freedom from adulteration or misbranding.¹

The intention of the user to deceive is immaterial.² What Congress meant by "package" was the original container.³ Congress has recently defined "package":

That the word "package" where it occurs the second and last time in the act entitled "An act to amend section 8 of an act entitled, 'An act for preventing the manufacture, sale, or transportation of adulterated or misbranded or poisonous deleterious foods, drugs, medicines, and liquors,

§ 1080. ¹ Act of June 30, 1906, c. 3915, 34 Stat. L. 769, as amended by 37 Stat. L. 732.

² United States v. Thirty-Six Bot-

tles of London Dry Gin, 210 Fed. 271, 127 C. C. A. 119 (3d Cir.).

³ McDermott v. Wisconsin, 228 U. S. 115, 57 L. ed. 754, 33 S. C. 431.

and for regulating traffic therein, and for other purposes', approved March 3, 1913, shall include and shall be construed to include wrapped meats inclosed in papers or other materials as prepared by the manufacturers thereof for sale."⁴

Labeling an article "compound essence of grape" does not suggest a mere imitation sufficient to put purchasers on notice.⁵

§ 1081. Contents — Guaranty from Manufacturer.

Section 9 provides as follows:

That no dealer shall be prosecuted under the provisions of this Act when he can establish a guaranty signed by the wholesaler, jobber, manufacturer, or other party residing in the United States, from whom he purchases such articles, to the effect that the same is not adulterated or misbranded within the meaning of this Act, designating it. Said guaranty, to afford protection, shall contain the name and address of the party or parties making the sale of such articles to such dealer, and in such case said party or parties shall be amenable to the prosecutions, fines and other penalties which would attach, in due course, to the dealer under the provisions of this Act.¹

A guarantor cannot be convicted under this section if he signs the guaranty long after the shipment. The statute must be construed according to its natural interpretation.² Likewise a guaranty is no defense unless the dealer obtained same simultaneously with the purchase.³ Continuing guaranties are within the scope of this section.⁴ The constitutionality of this section has been sustained.⁵

§ 1082. Seizure of Original Packages in Interstate and Foreign Commerce — Disposal.

Section 10 provides as follows:

That any article of food, drug or liquor that is adulterated or misbranded within the meaning of this Act, and is

⁴ Act of July 24, 1919.

Fed. 798, 112 C. C. A. 284 (2d Cir.).

⁵ United States v. Schider, 246 U. S. 519, 62 L. ed. 863, 38 S. C. 369.

³ Steinhardt v. United States, *supra*.

⁴ Glaser v. United States, 224

§ 1081. ¹ Act of June 30, 1906, c. 3915, 34 Stat. L. 771.

Fed. 84, 139 C. C. A. 566 (7th Cir.).

⁵ United States v. Heinle Specialty Co., 175 Fed. 299.

² Steinhardt v. United States, 191

being transported from one State, Territory, District or insular possession to another for sale, or, having been transported, remains unloaded, unsold or in original unbroken packages, or if it be sold or offered for sale in the District of Columbia or Territories, or insular possessions of the United States, or if it be imported from a foreign country for sale, or if it is intended for export to a foreign country, shall be liable to be proceeded against in any district court of the United States within the district where the same is found, and seized for confiscation by a process of libel for condemnation. And if such article is condemned as being adulterated or misbranded, or of a poisonous or deleterious character, within the meaning of this Act, the same shall be disposed of by destruction or sale, as the said court may direct, and the proceeds thereof, if sold, less the legal costs and charges, shall be paid into the Treasury of the United States, but such goods shall not be sold in any jurisdiction contrary to the provisions of this Act or the laws of that jurisdiction; *Provided, however,* That upon the payment of the costs of such libel proceedings and the execution and delivery of a good and sufficient bond to the effect that such articles shall not be sold or otherwise disposed of contrary to the provisions of this Act, or the laws of any State, Territory, District or insular possession, the court may by order direct that such articles be delivered to the owner thereof. The proceedings of such libel cases shall conform, as near as may be, to the proceedings in admiralty, except that either party may demand trial by jury of any issue of fact joined in any such case, and all such proceedings shall be at the suit of and in the name of the United States.¹

A libel under this section must allege that the goods had been transported "for sale."² The libel must allege facts, bringing the case within this section.³ A libel to forfeit a shipment in violation of this section need not necessarily allege the date, and objections to the omission can be availed of by answer.⁴ It is

§ 1082. ¹ Act of June 30, 1906, c. 3915, 34 Stat. L. 771.

² *United States v. Forty-six Packages of Sugar*, 183 Fed. 642.

³ *United States v. Six Hundred and*

Fifty Cases Tomato Catsup, 166 Fed. 773.

⁴ *United States v. Certain Can Syrup*, 192 Fed. 79; *United States v. Two Barrels Desiccated Eggs*, 185 Fed. 302.

no defense that the misbranding was done by an agent of the Government.⁵ A writ of error is the method of reviewing the final judgment under this section.⁶

§ 1083. Examination of Imported Food and Drugs — Admission Denied Adulterated or Misbranded Goods — Destruction — Bond Required — Charges.

Section 11 provides as follows :

The Secretary of the Treasury shall deliver to the Secretary of Agriculture, upon his request from time to time, samples of foods and drugs which are being imported into the United States or offered for import, giving notice thereof to the owner or consignee, who may appear before the Secretary of Agriculture, and have the right to introduce testimony, and if it appear from the examination of such samples that any article of food or drug offered to be imported into the United States is adulterated or misbranded within the meaning of this Act, or is otherwise dangerous to the health of the people of the United States, or is of a kind forbidden entry into, or forbidden to be sold or restricted in sale in the country in which it is made or from which it is exported, or is otherwise falsely labeled in any respect, the said article shall be refused admission, and the Secretary of the Treasury shall refuse delivery to the consignee and shall cause the destruction of any goods refused delivery which shall not be exported by the consignee within three months from the date of notice of such refusal under such regulations as the Secretary of the Treasury may prescribe: *Provided, That* the Secretary of the Treasury may deliver to the consignee such goods pending examination and decision in the matter on execution of a penal bond for the amount of the full invoice value of such goods, together with the duty thereon, and on refusal to return such goods for any cause to the custody of the Secretary of the Treasury, when demanded, for the purpose of ex-

⁵ United States *v.* Fifty Barrels of Whiskey, 165 Fed. 966.

⁶ Four Hundred and Forty-Three Cans Frozen Egg Product *v.* United States, 226 U. S. 172, 57 L. ed. 174, 33 S. C. 50; Lexington Mills Co. *v.*

United States, 202 Fed. 615, 121 C. C. A. 23 (8th Cir.); United States *v.* Seven Hundred Seventy-Nine Cases Molasses, 174 Fed. 325, 98 C. C. A. 197 (8th Cir.).

cluding them from the country, or for any other purpose, said consignee shall forfeit the full amount of the bond: *And provided further*, That all charges for storage, cartage, and labor on goods which are refused admission or delivery shall be paid by the owner or consignee, and in default of such payment shall constitute a lien against any future importation made by such owner or consignee.¹

§ 1084. Insular Possessions Included — “ Person ” Defined — Liability of Corporations, etc.

Section 12 provides as follows:

That the term “ Territory ” as used in this Act shall include the insular possessions of the United States. The word “ person ” as used in this Act shall be construed to import both the plural and the singular, as the case demands, and shall include corporations, companies, societies and associations. When construing and enforcing the provisions of this Act, the act, omission, or failure of any officer, agent, or other person acting for or employed by any corporation, company, society, or association, within the scope of his employment or office, shall in every case be also deemed to be the act, omission, or failure of such corporation, company, society, or association as well as that of the person.¹

§ 1085. Effect.

Section 13 provides as follows:

That this Act shall be in force and effect from and after the first day of January, nineteen hundred and seven.¹

§ 1083. ¹ Act of June 30, 1906, c. 3915, 34 Stat. L. 772.

§ 1085. ¹ Act of June 30, 1906, c. 3915, 34 Stat. L. 772.

§ 1084. ¹ Act of June 30, 1906, c. 3915, 34 Stat. L. 772.

CHAPTER LXV

NARCOTIC DRUGS LAWS

- § 1086. Manufacture of Opium — Regulation.
- § 1087. Conduct of Business — Bond.
- § 1088. Stamps Required.
- § 1089. Provisions Applicable to Stamps.
- § 1090. Penalty for Violation — Forfeiture.
- § 1091. Repeal.
- § 1092. Dealers in Opium and Its Derivatives — Registration — Tax.
- § 1093. Dealings on Written Orders — Exceptions — Order Forms.
- § 1094. Reports by Registered Dealers — Contents.
- § 1095. Persons Not Registered — Traffic in Aforesaid Drugs Prohibited — Exceptions.
- § 1096. Inspection of Orders and Returns — Certified Copies Furnished — Disclosure of Information Prohibited.
- § 1097. Preparations Containing Limited Quantities of Opium, Morphine, etc. — Record of Sales, etc. — Registration — Decocainized Coca Leaves and Preparations Therefrom.
- § 1098. Collection, etc., of Special Taxes — Regulation.
- § 1099. Violations — Evidence — Pleading Exemptions — Burden of Proof.
- § 1100. Penalties.
- § 1101. Enforcement of Provisions — Appointment of Officers.
- § 1102. Appropriation for Enforcement of Provisions.
- § 1103. Effect as Amending or Repealing Previous Acts.
- § 1104. Confiscation and Forfeiture of Seized Opium.

§ 1086. Manufacture of Opium — Regulation.

The first act passed by Congress was one to regulate the manufacture of smoking opium in the United States.¹ Section 1 provides :

That an internal-revenue tax of \$300 per pound shall be levied and collected upon all opium manufactured in the United States for smoking purposes ; and no person shall

§ 1086. ¹ Act of January 17, 1914, c. 10, 38 Stat. L. 277.

engage in such manufacture who is not a citizen of the United States and who has not given the bond required by the Commissioner of Internal Revenue. Every person who prepares opium suitable for smoking purposes from crude gum opium, or from any preparation thereof, or from the residue of smoked or partially smoked opium, commonly known as yen shee, or from any mixture of the above, or any of them, shall be regarded as a manufacturer of smoking opium within the meaning of this Act.

In an indictment under this section, the prosecution must prove that no bond was given as required by the Commissioner.² Under this section, the court held that merely adding water to an extract of opium is not manufacturing opium within the meaning of this section.³ The Supreme Court of the United States has also held that adding smoking opium to the residuum of opium that has been smoked is not a manufacture of opium.⁴

§ 1087. Conduct of Business — Bond.

Section 2 provides :

That every manufacturer of such opium shall file with the collector of internal revenue of the district in which his manufactory is located such notices, inventories, and bonds, shall keep such books and render such returns of material and products, shall put up such signs and affix such number to his factory, and conduct his business under such surveillance of officers and agents as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may by regulation require. But the bond required of such manufacturer shall be with sureties satisfactory to the collector of internal revenue, and in a penal sum of not less than \$100,000; and the sum of said bond may be increased from time to time and additional sureties

² Lee Mow Lin v. United States, 240 Fed. 408, 153 C. C. A. 334 (8th Cir.); S. C. 250 Fed. 694, 162 C. C. A. 656 (8th Cir.); *Writ of Certiorari denied* in 247 U. S. 518, 62 L. ed. 1245, 38 S. C. 581; Chin Sing v. United

States, 227 Fed. 397, 142 C. C. A. 93 (7th Cir.).

³ Seidler v. United States, 228 Fed. 336, 142 C. C. A. 628 (2d Cir.).

⁴ Shelley v. United States, 229 U. S. 239, 57 L. ed. 1167.

required, at the discretion of the collector or under instructions of the Commissioner of Internal Revenue.¹

As this section refers to the regulations promulgated by the Commissioner of Internal Revenue, an indictment for violation thereof necessarily must set forth the regulations.² Under an indictment for having manufactured opium without a bond, it having been shown that the accused had utensils and materials, the prosecution may introduce a letter written by the accused to the effect that he was unable to break himself of the habit of opium smoking.³

§ 1088. Stamps Required.

Section 3 provides:

That all opium prepared for smoking manufactured in the United States shall be duly stamped in such a permanent manner as to denote the payment of the internal-revenue tax thereon.¹

§ 1089. Provisions Applicable to Stamps.

Section 4 provides:

That the provisions of existing laws covering the engraving, issue, sale, accountability, effacement, cancellation, and the destruction of stamps relating to tobacco and snuff, as far as applicable, are hereby made to apply to stamps provided for by the preceding section.¹

§ 1090. Penalty for Violation — Forfeiture.

Section 5 provides:

That a penalty of not less than \$10,000 or imprisonment of not less than five years, or both, in the discretion of the court, shall be imposed for each and every violation of the preceding sections of this Act relating to opium by any person or persons; and all opium prepared for smoking

§ 1087. ¹ Act of January 17, 1914, c. 10, 38 Stat. L. 277.

² *Chin Sing v. United States*, 227 Fed. 397, 142 C. C. A. 93 (7th Cir.).

³ *Tam Shi Yan v. United States*,

224 Fed. 422, 140 C. C. A. 116 (2d Cir.).

§ 1088. ¹ Act of January 17, 1914, c. 10, 38 Stat. L. 277.

§ 1089. ¹ Act of January 17, 1914, c. 10, 38 Stat. L. 277.

wherever found within the United States without the stamps required by this Act shall be forfeited and destroyed.¹

§ 1091. Repeal.

Section 6 provides :

The provisions of the Act of October first eighteen hundred and ninety (Twenty-sixth Statutes, page fifteen hundred and sixty-seven), in so far as they relate to the manufacture of smoking opium, are hereby repealed.¹

§ 1092. Dealers in Opium and Its Derivatives — Registration — Tax.

Congress passed another act which is popularly known as the "Harrison Narcotic Law." Section 1 provides :

That on or before July 1 of each year every person who imports, manufactures, produces, compounds, sells, deals in, dispenses, or gives away opium or coca leaves, or any compound, manufacture, salt, derivative, or preparation thereof, shall register with the collector of internal revenue of the district his name or style, place of business and place or places where such business is to be carried on, and pay the special taxes hereinafter provided ; every person who on January 1, 1919, is engaged in any of the activities above enumerated, or who between such date and the passage of this Act first engages in any of such activities, shall within 30 days after the passage of this Act make like registration, and shall pay the proportionate part of the tax for the period ending June 30, 1919 ; and every person who first engages in any of such activities after the passage of this Act shall immediately make like registration and pay the proportionate part of the tax for the period ending on the following June 30th ; importers, manufacturers, producers, or compounders, \$24 per annum ; wholesale dealers, \$12 per annum ; retail dealers, \$6 per annum ; physicians, dentists, veterinary surgeons, and other practitioners lawfully entitled to distribute, dispense, give away, or administer any of the aforesaid drugs to patients upon

§ 1090. ¹ Act of January 17, 1914,
c. 10, 38 Stat. L. 277.

§ 1091. ¹ Act of January 17, 1914,
c. 10, 38 Stat. L. 277.

whom they in the course of their professional practice are in attendance, shall pay \$3 per annum. Every person who imports, manufactures, compounds or otherwise produces for sale or distribution any of the aforesaid drugs shall be deemed to be an importer, manufacturer or producer. Every person who sells, or offers for sale any of said drugs in the original stamped packages, as hereinafter provided, shall be deemed a wholesale dealer. Every person who sells, or dispenses from original stamped packages, as hereinafter provided, shall be deemed a retail dealer: *Provided*, That the office, or, if none, the residence of any person shall be considered for the purpose of this Act his place of business; but no employee of any person who has registered and paid special tax as herein required, acting within the scope of his employment, shall be required to register and pay special tax provided by this section: *Provided, further*, That officials of the United States, Territorial, District of Columbia, or insular possessions, State or municipal governments, who in the exercise of their official duties engage in any of the business herein described, shall not be required to register, nor pay special tax, nor stamp the aforesaid drugs as hereinafter prescribed, but their right to this exemption shall be evidenced in such manner as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may by regulations prescribe. It shall be unlawful for any person required to register under the provisions of this Act to import, manufacture, produce, compound, sell, deal in, dispense, distribute, administer or give away any of the aforesaid drugs without having registered and paid the special tax as imposed by this section. That the word 'person' as used in this Act shall be construed to mean and include a partnership, association, company or corporation, as well as a natural person; and all provisions of existing law relating to special taxes, as far as necessary, are hereby extended and made applicable to this section. That there shall be levied, assessed, collected and paid upon opium, coca leaves, any compound, salt, derivative, or preparation thereof, produced in or imported into the United States, and sold or removed for consumption or sale, an internal-revenue tax at the rate of 1 per cent per ounce, and any

fraction of an ounce in a package shall be taxed as an ounce, such tax to be paid by the importer, manufacturer, producer, or compounder thereof, and to be represented by appropriate stamps, to be provided by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury; and the stamps herein provided shall be so affixed to the bottle or other container as to securely seal the stopper, covering or wrapper thereof. The tax imposed by this section shall be in addition to any import duty imposed on the aforesaid drugs. It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the aforesaid drugs except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps from any of the aforesaid drugs shall be *prima facie* evidence of a violation of this section by the person in whose possession same may be found; and the possession of any original stamped package containing any of the aforesaid drugs by any person who has not registered and paid special taxes as required by this section shall be *prima facie* evidence of liability to such special tax: *Provided, That* the provisions of this paragraph shall not apply to any person having in his or her possession any of the aforesaid drugs which have been obtained from a registered dealer in pursuance of a prescription, written for legitimate medical uses, issued by a physician, dentist, veterinary surgeon, or other practitioner registered under this Act; and where the bottle or other container in which such drug may be put up by the dealer upon said prescription bears the name and registry number of the druggist, serial number of prescription, name and address of the patient, and name, address and registry number of the persons writing said prescription; or to the dispensing or administration, or giving away of any of the aforesaid drugs to a patient by a registered physician, dentist, veterinary surgeon, or other practitioner in the course of his professional practice, and where said drugs are dispensed or administered to the patient for legitimate medical purposes, and the record kept as required by this Act of the drugs so dispensed, administered, distributed or given away. And all the provisions of existing laws relating to the engraving, issuance, sale, accountability, cancellation and

destruction of tax-paid stamps, provided for in the internal-revenue laws are, in so far as necessary, hereby extended and made to apply to stamps provided by this section. That all unstamped packages of the aforesaid drugs found in the possession of any person, except as herein provided, shall be subject to seizure and forfeiture, and all the provisions of existing internal-revenue laws relating to searches, seizures and forfeitures of unstamped articles are hereby extended to and made to apply to the articles taxed under this Act and the persons upon whom these taxes are imposed. Importers, manufacturers, and wholesale dealers shall keep such books and records and render such monthly returns in relation to the transactions in the aforesaid drugs as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may by regulations require. The Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall make all needful rules and regulations for carrying the provisions of this Act into effect.¹

This act has been held to be constitutional.² However, the Circuit Court of Appeals for the Seventh Circuit has held the last paragraph of the second section of the Act to be unconstitutional.³ The court will not inquire into the motives, justice or incidental effect that led to the enactment of a statute, if it is a revenue law and constitutional.⁴ The common law rule as to mutual assent of the parties being enough to validate a sale of personalty will be sufficient to make out a sale in a case where delivery of the drugs and payment therefor should be made.⁵ An indictment

§ 1092. ¹ Act of December 17, 1914, c. 1, 38 Stat. L. 785, as amended by the Act of February 24, 1919, § 1006.

² *United States v. Doremus*, 249 U. S. 86, 63 L. ed. 282, 39 S. C. 214; *United States v. Webb*, 249 U. S. 96, 63 L. ed. 285, 39 S. C. 217; *United States v. Moy*, 241 U. S. 394, 60 L. ed. 1061, 36 S. C. 658; *United States v. Denker*, 255 Fed. 339; *Foreman v. United States*, 255 Fed. 621, — C. C. A. — (4th Cir.); *United*

States v. Jin Fuey Moy, 253 Fed. 213; *Hughes v. United States*, 253 Fed. 543, — C. C. A. — (8th Cir.); *United States v. Charter*, 227 Fed. 331.

³ *Blunt v. United States*, 255 Fed. 332, — C. C. A. — (7th Cir.).

⁴ *Blunt v. United States*, *supra*; *Hughes v. United States*, 253 Fed. 543, — C. C. A. — (8th Cir.); *United States v. Rosenberg*, 251 Fed. 963.

⁵ *Hammer v. United States*, 249 Fed. 336, 161 C. C. A. 344 (2d Cir.).

is sufficient although it does not negative the exceptions of the statute,⁶ but in another case it was held that negating exceptions was essential.⁷ The indictment must allege that the accused is engaged in a business requiring him to register and pay the tax under the Act.⁸ The statute must be interpreted according to the fair intention of the Legislature, and hence the court held novocaine not to be within the meaning of the Act.⁹ But this section has been held not to apply to mere consumers of the drug.¹⁰ The courts will take judicial notice of the fact that no opium is grown or produced in this country;¹¹ however, the Supreme Court intimated that it was hardly warranted in making such an assumption.¹² The courts take judicial knowledge of the facts of chemistry contained in the United States Pharmacopœia,¹³ but the court would not take judicial notice of the fact that cocaine is a derivative of coca leaves or that morphine is a salt of opium; these facts must be alleged in the indictment.¹⁴ In a recent case, the court distinguished between "dispense" and "distribute," saying that "to dispense is to deal out or divide out regularly; to distribute is to deal or divide out in proportion or in shares."¹⁵

§ 1093. Dealings on Written Orders — Exceptions — Order Forms.

Section 2 provides :

That it shall be unlawful for any person to sell, barter, exchange, or give away any of the aforesaid drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Commissioner of

⁶ United States *v.* D'Arcy, 243 Fed. 739; Wallace *v.* United States, 243 Fed. 300, 156 C. C. A. 80 (7th Cir.); United States *v.* O'Hara, 242 Fed. 749.

⁷ United States *v.* Hammers, 241 Fed. 542.

⁸ United States *v.* Carney, 228 Fed. 163.

⁹ Lowe *v.* Farbwerke-Hoechst Co., 240 Fed. 671, 153 C. C. A. 469 (2d Cir.).

¹⁰ United States *v.* Woods, 224 Fed. 278.

¹¹ United States *v.* Brown, 224 Fed. 135.

¹² United States *v.* Jin Fuey Moy, 241 U. S. 394, 60 L. ed. 1061, 36 S. C. 658.

¹³ Melanson *v.* United States, 256 Fed. 783, — C. C. A. — (5th Cir.).

¹⁴ United States *v.* Hammers, 241 Fed. 542.

¹⁵ Foreman *v.* United States, 255 Fed. 621, — C. C. A. — (4th Cir.).

Internal Revenue. Every person who shall accept any such order, and in pursuance thereof shall sell, barter, exchange, or give away any of the aforesaid drugs, shall preserve such order for a period of two years in such a way as to be readily accessible to inspection by any officer, agent, or employee of the Treasury Department duly authorized for that purpose, and the State, Territorial, District, municipal and insular officials named in section five of this Act. Every person who shall give an order as herein provided to any other person for any of the aforesaid drugs shall, at or before the time of giving such order, make or cause to be made a duplicate thereof on a form to be issued in blank for that purpose by the Commissioner of Internal Revenue, and in case of the acceptance of such order, shall preserve such duplicate for said period of two years in such a way as to be readily accessible to inspection by the officers, agents, employees, and officials hereinbefore mentioned. Nothing contained in this section shall apply — (a) To the dispensing or distribution of any of the aforesaid drugs to a patient by a physician, dentist or veterinary surgeon registered under this Act in the course of his professional practice only: *Provided, That* such physician, dentist or veterinary surgeon shall keep a record of all such drugs dispensed or distributed, showing the amount dispensed or distributed, the date, and the name and address of the patient to whom such drugs are dispensed or distributed, except such as may be dispensed or distributed to a patient upon whom such physician, dentist or veterinary surgeon shall personally attend; and such record shall be kept for a period of two years, from the date of dispensing or distributing such drugs, subject to inspection, as provided in this Act. (b) To the sale, dispensing, or distribution of any of the aforesaid drugs by a dealer to a consumer under and in pursuance of a written prescription issued by a physician, dentist or veterinary surgeon registered under this Act: *Provided, however, That* such prescription shall be dated as of the day on which signed and shall be signed by the physician, dentist or veterinary surgeon who shall have issued the same: *And provided further, That* such dealer shall preserve such prescription for a period of two years from the day on which such prescription is filled in such a way as to be

readily accessible to inspection by the officers, agents, employees, and officials hereinbefore mentioned. (c) To the sale, exportation, shipment or delivery of any of the aforesaid drugs by any person within the United States or any Territory or the District of Columbia, or any of the insular possessions of the United States to any person in any foreign country, regulating their entry in accordance with such regulations for importation thereof into such foreign country as are prescribed by said country, such regulations to be promulgated from time to time by the Secretary of State of the United States. (d) To the sale, barter, exchange or giving away of any of the aforesaid drugs to any officer of the United States Government or of any State, territorial district, county, or municipal or insular government lawfully engaged in making purchases thereof for the various departments of the Army and Navy, the Public Health Service, and for the Government, State, territorial district, county or municipal or insular hospitals or prisons. The Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall cause suitable forms to be prepared for the purposes above mentioned, and shall cause the same to be distributed to collectors of internal revenue for sale by them to those persons who shall have registered and paid the special tax as required by section one of this Act in their districts, respectively; and no collector shall sell any of such forms to any persons other than a person who has registered and paid the special tax as required by section one of this Act in his district. The price at which such forms shall be sold by said collectors shall be fixed by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, but shall not exceed the sum of \$1 per hundred. Every collector shall keep an account of the number of such forms sold by him, the names of the purchasers, and the number of such forms sold to each of such purchasers. Whenever any collector shall sell any of such forms, he shall cause the name of the purchaser thereof to be plainly written or stamped thereon before delivering the same; and no person other than such purchaser shall use any of said forms bearing the name of such purchaser for the purpose of procuring any of the aforesaid drugs, or furnish

any of the forms bearing the name of such purchaser to any person with intent thereby to procure the shipment or delivery of any of the aforesaid drugs. It shall be unlawful for any person to obtain by means of said order forms any of the aforesaid drugs for any purpose other than the use, sale, or distribution thereof by him in the conduct of a lawful business in said drugs or in the legitimate practice of his profession. The provisions of this Act shall apply to the United States, the District of Columbia, the Territory of Alaska, the Territory of Hawaii, the insular possessions of the United States, and the Canal Zone. In Porto Rico and the Philippine Islands the administration of this Act, the collection of the said special tax, and the issuance of the order forms specified in section two shall be performed by the appropriate internal revenue officers of those governments, and all revenues collected hereunder in Porto Rico and the Philippine Islands shall accrue intact to the general governments thereof, respectively. The courts of first instance in the Philippine Islands shall possess and exercise jurisdiction in all cases arising under this act in said islands. The President is authorized and directed to issue such Executive orders as will carry into effect in the Canal Zone the intent and purpose of this Act by providing for the registration and the imposition of a special tax upon all persons in the Canal Zone who produce, import, compound, deal in, dispense, sell, distribute, or give away opium or coca leaves, their salts, derivatives, or preparations.¹

This section has been held to be constitutional.² The United States Circuit Court of Appeals for the Fourth Circuit held that this section was an exercise of the police power reserved to the States and hence unconstitutional,³ but the United States Circuit Court of Appeals for the Fifth Circuit held otherwise.⁴ The Act was intended to raise revenue from the sale of drugs and

§ 1093. ¹ Act of December 17, 1914, c. 1, 38 Stat. L. 786.

² *Thompson v. United States*, 258 Fed. 196, — C. C. A. — (8th Cir.); *United States v. Loewenthal*, 257 Fed. 444.

³ *Blunt v. United States*, 255 Fed. 332, — C. C. A. — (7th Cir.).

⁴ *Fyke v. United States*, 254 Fed. 225, — C. C. A. — (7th Cir.).

applies, therefore, to all sellers of the drug whether or not they are registered.⁵ Where each count of the indictment charged the accused with dealing in the forbidden drugs without having registered and paid the special tax required by law, the court held the indictment to be valid and that the counts were not vague, indefinite, or uncertain.⁶ Where the indictment quoted the language of the statute by alleging that the act was "not in the course of his professional practice", the court held it not bad as a conclusion of law as it stated "ultimate facts."⁷ The terms of this section are broad enough to include all persons, whether actually registered or not, who sell the prohibited drugs,⁸ and it is immaterial whether or not title is in the dispenser.⁹ It has been held that a person who has registered can violate the act as well as any one else, and that the sale of the drug by a registered physician is no immunity.¹⁰ Although a physician who is registered under this act is exempt, yet it was held to be a violation of this section to dispense heroin beyond his professional practice.¹¹ The issuance of a prescription by a physician who does not participate in the sale does not amount to a sale within the meaning of this section.¹² A physician is not required to keep a record of the drugs dispensed or distributed in good faith nor preserve the orders received in the course of his professional practice when he is in personal attendance on the patients.¹³ A physician need not keep a duplicate of the patient's order if he keeps a record of the dispensing.¹⁴ In a prosecution under this section, the exclusion of a letter of inquiry written by the accused to the Commissioner of Internal Revenue is proper.¹⁵

⁵ *Fyke v. United States*, 254 Fed. 225, — C. C. A. — (7th Cir.).

⁶ *United States v. Lowenthal*, 257 Fed. 444.

⁷ *United States v. Rosenberg*, 251 Fed. 963.

⁸ *Fyke v. United States*, 254 Fed. 225, — C. C. A. — (7th Cir.).

⁹ *United States v. Jin Fuey Moy*, 253 Fed. 213.

¹⁰ *Thompson v. United States*, 258 Fed. 196, — C. C. A. — (8th Cir.); *Thurston v. United States*, 241 Fed. 335, 154 C. C. A. 215 (5th

Cir.). *Certiorari denied*, 245 U. S. 646, 62 L. ed. 529, 38 S. C. 9.

¹¹ *United States v. Hoyt*, 255 Fed. 927, — C. C. A. — (8th Cir.); *Hughes v. United States*, 253 Fed. 543.

¹² *Foreman v. United States*, 255 Fed. 621, — C. C. A. — (4th Cir.).

¹³ *Tucker v. Williamson*, 229 Fed. 201.

¹⁴ *United States v. Charter*, 227 Fed. 331.

¹⁵ *Thompson v. United States*, 258 Fed. 196, — C. C. A. — (8th Cir.).

§ 1094. Reports by Registered Dealers — Contents.

Section 3 provides :

That any person who shall be registered in any internal-revenue district under the provisions of section one of this Act shall, whenever required so to do by the collector of the district, render to the said collector a true and correct statement or return, verified by affidavit, setting forth the quantity of the aforesaid drugs received by him in said internal-revenue district during such period immediately preceding the demand of the collector, not exceeding three months, as the said collector may fix and determine; the names of the persons from whom the said drugs were received; the quantity in each instance received from each of such persons, and the date when received.¹

§ 1095. Persons Not Registered — Trade in Aforesaid Drugs Prohibited — Exceptions.

Section 4 provides :

That it shall be unlawful for any person who shall not have registered and paid the special tax as required by section 1 of this Act to send, ship, carry or deliver any of the aforesaid drugs from any State or Territory or the District of Columbia, or any insular possession of the United States, to any person in any other State or Territory or the District of Columbia or any insular possession of the United States: *Provided, That* nothing contained in this section shall apply to common carriers engage in transporting the aforesaid drugs, or to any employee acting within the scope of his employment, of any person who shall have registered and paid the special tax as required by section one of this Act, or to any person who shall deliver any such drug which has been prescribed or dispensed by a physician, dentist, or veterinarian required to register under the terms of this Act, who has been employed to prescribe for the particular patient receiving such drug, or to any United States, State, county, municipal, District, Territorial, or insular officer or official acting within the scope of his official duties.¹

§ 1094. ¹ Act of December 17, 1914, c. 1, 38 Stat. L. 787.

§ 1095. ¹ Act of December 17, 1914, c. 1, 38 Stat. L. 788.

Under the Penal Code, § 332, the defendant is a principal in an offense under the Harrison Act if he orders opium to be shipped to him from another who sells it unlawfully.²

§ 1096. Inspection of Orders and Returns — Certified Copies Furnished — Disclosure of Information Prohibited.

Section 5 provides :

That the duplicate-order forms and the prescriptions required to be preserved under the provisions of section two of this Act, and the statements or returns filed in the office of the collector of the district, under the provisions of section three of this Act, shall be open to inspection by officers, agents and employees of the Treasury Department duly authorized for that purpose; and such officials of any State or Territory, or of any organized municipality therein, or of the District of Columbia, or any insular possession of the United States, as shall be charged with the enforcement of any law or municipal ordinance regulating the sale, prescribing, dispensing, dealing in, or distribution of the aforesaid drugs. Each collector of internal revenue is hereby authorized to furnish, upon written request, certified copies of any of the said statements or returns filed in his office to any of such officials of any State or Territory, or organized municipality therein, or the District of Columbia, or any insular possession of the United States, as shall be entitled to inspect the said statements or returns filed in the office of the said collector, upon the payment of a fee of \$1 for each one hundred words or fraction thereof in the copy or copies so requested. Any person who shall disclose the information contained in the said statements or returns or in the said duplicate-order forms, except as herein expressly provided, and except for the purpose of enforcing the provisions of this Act, or for the purpose of enforcing any law of any State or Territory or the District of Columbia, or any insular possession of the United States, or ordinance of any organized municipality therein, regulating the sale, prescribing, dispensing, dealing in, or distribution of the aforesaid drugs, shall, on conviction, be fined or imprisoned as provided by section nine of this

² United States v. Johnson, 228 Fed. 251.

Act. And collectors of internal revenue are hereby authorized to furnish upon written request, to any person, a certified copy of the names of any or all persons who may be listed in their respective collection districts as special taxpayers under the provisions of this Act, upon payment of a fee of \$1 for each one hundred names or fraction thereof in the copy so requested.¹

§ 1097. Preparations Containing Limited Quantities of Opium, Morphine, etc. — Record of Sales, etc. — Registration — Decocainized Coca Leaves and Preparations Therefrom.

Section 6 provides :

That the provisions of this Act shall not be construed to apply to the manufacture, sale, distribution, giving away, dispensing, or possession of preparations and remedies which do not contain more than two grains of opium, or more than one-fourth of a grain of morphine, or more than one-eighth of a grain of heroin, or more than one grain of codeine, or any salt or derivative of any of them in one fluid ounce, or, if a solid or semisolid preparation, in one avoirdupois ounce ; or to liniments, ointments, or other preparations which are prepared for external use, only, except liniments, ointments, and other preparations which contain cocaine or any of its salts or alpha or beta eucaine or any of their salts or any synthetic substitute for them : *Provided, That* such remedies and preparations are manufactured, sold, distributed, given away, dispensed, or possessed as medicines and not for the purpose of evading the intention and provisions of this Act : *Provided further, That* any manufacturer, producer, compounder or vendor (including dispensing physicians) of the preparations and remedies mentioned in this section shall keep a record of all sales, exchanges, or gifts of such preparations and remedies in such manner as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall direct. Such record shall be preserved for a period of two years in such a way as to be readily accessible to inspection by any officer, agent or employee of the Treasury Department duly authorized for that purpose, and the

¹ § 1096. Act of December 17, 1914, c. 1, 38 Stat. L. 788.

State, Territorial, District, municipal, and insular officers named in section 5 of this Act, and every such person so possessing or disposing of such preparations and remedies shall register as required in section 1 of this Act, and, if he is not paying a tax under this Act, he shall pay a special tax of \$1 for each year, or fractional part thereof, in which he is engaged in such occupation, to the collector of internal revenue of the district in which he carries on such occupation as provided in this Act. The provisions of this Act as amended shall not apply to decocainized coca leaves or preparations made therefrom, or to other preparations of coca leaves which do not contain cocaine.¹

The courts are divided as to the legality of a prescription for an unusually large quantity of opium; one court held such a prescription to be unlawful,² while two other courts decided that it was lawful and that there is no limitation in the statute as to amount to be prescribed.³ Novocaine is of the nature of an ointment and therefore not within the scope of this section.⁴

§ 1098. Collection, etc., of Special Taxes — Regulation.

Section 7 provides:

That all laws relating to the assessment, collection, remission and refund of internal-revenue taxes, including section thirty-two hundred and twenty-nine of the Revised Statutes of the United States, so far as applicable to and not inconsistent with the provisions of this Act, are hereby extended and made applicable to the special taxes imposed by this Act.¹

§ 1099. Violations — Evidence — Pleading Exemptions — Burden of Proof.

Section 8 provides:

That it shall be unlawful for any person not registered under the provisions of this Act, and who has not paid

§ 1097. ¹ Act of December 17, 1914, c. 1, 38 Stat. L. 789, as amended by the Act of February 24, 1919, § 1007.

² United States v. Curtis, 229 Fed. 288.

³ United States v. Friedman, 224

Fed. 276; United States v. Fleming, 251 Fed. 932.

⁴ Lowe v. Farbwerke-Hoechst Co., 240 Fed. 671, 153 C. C. A. 469 (2d Cir.).

§ 1098. ¹ Act of December 17, 1914, c. 1, 38 Stat. L. 789.

the special tax provided for by this Act, to have in his possession or under his control any of the aforesaid drugs; and such possession or control shall be presumptive evidence of a violation of this section, and also of a violation of the provisions of section one of this Act: *Provided, That* this section shall not apply to any employee of a registered person, or to a nurse under the supervision of a physician, dentist, or veterinary surgeon registered under this Act, having such possession or control by virtue of his employment or occupation and not on his own account; or to the possession of any of the aforesaid drugs which has or have been prescribed in good faith by a physician, dentist or veterinary surgeon registered under this Act; or to any United States, State, county, municipal, District, Territorial, or insular officer or official who has possession of any said drugs, by reason of his official duties, or to a warehouseman holding possession for a person registered and who has paid the taxes under this Act; or to common carriers engaged in transporting such drugs: *Provided further, That* it shall not be necessary to negative any of the aforesaid exemptions in any complaint, information, indictment or other writ or proceeding laid or brought under this Act; and the burden of proof of any such exemption shall be upon the defendant.¹

The constitutionality of this section has been upheld in one case,² but another court expressed its doubts.³ The act must be construed as a whole and force given to every part where possible.⁴ "Any person not registered" has been held to mean only persons with whom the statute deals, — the persons who are required to register by section one; ⁵ but the Circuit Court of Appeals for the Second Circuit held that "any person" referred not only to the persons described in section one and who were allowed to register,

§ 1099. ¹ Act of December 17, 1914, c. 1, 38 Stat. L. 789.

² United States v. Brown, 224 Fed. 135.

³ United States v. Denker, 255 Fed. 339.

⁴ United States v. Brown, *supra*;

United States v. Charter, 227 Fed. 331.

⁵ United States v. Jin Fuey Moy, 241 U. S. 394, 60 L. ed. 1061, 36 S. C. 658; United States v. Denker, 255 Fed. 339; United States v. Wilson, 225 Fed. 82.

but also to all other persons.⁶ Where the indictment alleged that the accused had unlawfully and knowingly sold and dispensed morphine sulphate tablets, the court held that this was equivalent to saying that the drugs were in his possession and an offense was charged in the indictment.⁷ The indictment must charge that the accused was a person required to register or was engaged in a business that required him to do so.⁸ But in another case, the court held that possession of such a drug is presumptive evidence of its unlawful importation as well as an obligation to pay the special tax.⁹ This section does not purport to extend the registration features of the act to consumers, but makes it unlawful for any person of the classes described in section one to possess the drugs.¹⁰ This section creates a rule of evidence in that, if the Government proves that the defendant was doing any of the things mentioned in section one or that a narcotic was found in his possession, he would be presumptively guilty of violating the act.¹¹ A physician who has failed to keep a duplicate of one of his orders for drugs is not within the scope of this section.¹² Although the parties had registered under the act, they could still conspire to violate it and each could violate it.¹³ It is unnecessary to negative the statutory exceptions in the indictment,¹⁴ and the Sixth Amendment to the Constitution does not preclude Congress from making an enactment to that effect.¹⁵

⁶ *Wilson v. United States*, 229 Fed. 344, 143 C. C. A. 464 (2d Cir.).

⁷ *United States v. Curtis*, 229 Fed. 288; *United States v. Wilson*, *supra*.

⁸ *United States v. Denker*, *supra*; *United States v. Carney*, 228 Fed. 163; *United States v. Jin Fuey Moy*, 225 Fed. 1003, *Affirmed* in 241 U. S. 394, 60 L. ed. 1061, 36 S. C. 658; *United States v. Woods*, 224 Fed. 278; *United States v. Friedman*, 224 Fed. 276.

⁹ *United States v. Brown*, 224 Fed. 135.

¹⁰ *United States v. Woods*, 224 Fed. 278; *United States v. Wilson*, 225 Fed. 82.

¹¹ *United States v. Wilson*, *supra*; *United States v. O'Hara*, 242 Fed. 749; *United States v. Ah Hung*, 243 Fed. 762.

¹² *United States v. Charter*, 227 Fed. 331.

¹³ *Thurston v. United States*, 241 Fed. 335, 154 C. C. A. 215 (5th Cir.); *Certiorari denied* in 245 U. S. 646, 62 L. ed. 529, 38 S. C. 9.

¹⁴ *United States v. Loewenthal*, 257 Fed. 444; *Melanson v. United States*, 256 Fed. 783, — C. C. A. — (5th Cir.); *Wallace v. United States*, 243 Fed. 300, 156 C. C. A. 80 (7th Cir.).

¹⁵ *Fyke v. United States*, 254 Fed. 225, — C. C. A. — (5th Cir.).

§ 1100. Penalties.

Section 9 provides :

That any person who violates or fails to comply with any of the requirements of this Act shall, on conviction, be fined not more than \$2000 or be imprisoned not more than five years, or both, in the discretion of the court.¹

This section prescribes punishment for violation of or a failure to comply with any of the requirements of the act.² An indictment charging an unlawful sale under this act charges a violation of the act and the accused is subject to the penalties prescribed by this section.³ A judgment will not be reversed because of an insufficient count of an indictment under this section where it appears that there was enough evidence to support a term of imprisonment imposed for a conviction of a single offense under another good count of the indictment.⁴ This section when read in conjunction with section 335 of the Penal Code, makes any violation of the act a felony.⁵

§ 1101. Enforcement of Provisions — Appointment of Officers.

Section 10 provides :

That the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, is authorized to appoint such agents, deputy collectors, inspectors, chemists, assistant chemists, clerks and messengers in the field and in the Bureau of Internal Revenue in the District of Columbia as may be necessary to enforce the provisions of this Act.¹

§ 1102. Appropriation for Enforcement of Provisions.

Section 11 provides :

That the sum of \$150,000, or so much thereof as may be necessary, be, and hereby is, appropriated, out of any moneys in the Treasury not otherwise appropriated, for

§ 1100. ¹ Act of December 17, 1914, c. 1, 38 Stat. L. 789. Fed. 793, 151 C. C. A. 643 (5th Cir.). *Certiorari denied* in 245 U. S. 664,

² United States v. O'Hara, 242 62 L. ed. 537, 38 S. C. 62. Fed. 749.

³ *Fyke v. United States*, 254 Fed. 278. ⁵ United States v. Woods, 224 Fed.

225, — C. C. A. — (5th Cir.). **§ 1101.** ¹ Act of December 17,

⁴ *Baldwin v. United States*, 238 1914, c. 1, 38 Stat. L. 789.

the purpose of carrying into effect the provisions of this Act.¹

§ 1103. Effect as Amending or Repealing Previous Acts.
Section 12 provides :

That nothing contained in this Act shall be construed to impair, alter, amend or repeal any of the provisions of the Act of Congress approved June thirtieth, nineteen hundred and six, entitled ' An Act for preventing the manufacture, sale or transportation of adulterated or misbranded, or poisonous, or deleterious foods, drugs, medicines and liquors, and for regulating traffic therein, and for other purposes ', and any amendment thereof, or of the Act approved February ninth, nineteen hundred and nine, entitled ' An Act to prohibit the importation and use of opium for other than medicinal purposes ', and any amendment thereof.¹

§ 1104. Confiscation and Forfeiture of Seized Opium.
Congress has recently provided :

That all opiums, its salts, derivatives, and compounds, and coca leaves, salts, derivatives, and compounds thereof, which may now be under seizure or which may hereafter be seized by the United States Government from any person or persons charged with any violation of the Act of October 1, 1890, as amended by the Acts of March 3, 1897, February 9, 1909, and January 17, 1914, or the Act of December 17, 1914, shall upon conviction of the person or persons from whom seized be confiscated by and forfeited to the United States; and the Secretary is hereby authorized to deliver for medical or scientific purposes to any department, bureau, or other agency of the United States Government, upon proper application therefor under such regulation as may be prescribed by the Commissioner, with the approval of the Secretary, any of the drugs so seized, confiscated, and forfeited to the United States. The provisions of this section shall also apply to any of the aforesaid drugs seized or coming into the possession of the United States in the enforcement of any of the above-mentioned

§ 1102. ¹ Act of December 17, 1914, c. 1, 38 Stat. L. 789.

§ 1103. ¹ Act of December 17, 1914, c. 1, 38 Stat. L. 790.

Acts where the owner or owners thereof are unknown. None of the aforesaid drugs coming into possession of the United States under the operation of said Acts, or the provisions of this section, shall be destroyed without certification by a committee appointed by the Commissioner, with the approval of the Secretary, that they are of no value for medical or scientific purposes.¹

§ 1104. ¹ Act of February 24, 1919, § 1008.

CHAPTER LXVI

WHITE SLAVE TRAFFIC ACT

- § 1105. Scope of Terms "Interstate Commerce" and "Foreign Commerce" as Used in Act.
- § 1106. Transporting, etc., Females for Immoral Practices a Felony — Furnishing Tickets, etc., Included — Punishment.
- § 1107. Constitutionality.
- § 1108. Scope.
- § 1109. Means of Transportation.
- § 1110. Agency.
- § 1111. Witnesses — Accomplices.
- § 1112. Inducing, etc., Transportation of Women for Immoral Purposes a Felony — Punishment.
- § 1113. Scope.
- § 1114. Witnesses in General.
- § 1115. Inducing, etc., Interstate Transportation of Females under Eighteen for Immoral Practices a Felony — Punishment.
- § 1116. Jurisdiction of Courts.
- § 1117. Alien Prostitutes — Information Bureau Established — Authority of Commissioner-General of Immigration — Statements of Alien Females.
- § 1118. Statement of Alien Inmates by Keepers of Houses of Prostitution — Failure to File Statement — Making False Statement — Failure to Disclose Facts in Statement — Penalty.
- § 1119. Presumption from Failure to File Statement — Self-Incrimination as Excuse for Failure to File Statement — Immunity for Truthful Statements.
- § 1120. Immunity — Place of Trial.
- § 1121. Application of the Law.
- § 1122. Alaska, Insular Possessions, and Canal Zone Included in "Territory" — "Person" Construed — Corporations, etc., Responsible for Agents, etc.
- § 1123. Title of Act.

§ 1105. Scope of Terms "Interstate Commerce" and "Foreign Commerce" as Used in Act.

Section 1 of the White-slave Traffic Act provides:

That the term "interstate commerce", as used in this Act, shall include transportation from any State or Terri-

tory, or the District of Columbia to any other State or Territory or the District of Columbia, and the term ' foreign commerce ', as used in this Act, shall include transportation from any State or Territory or the District of Columbia to any foreign country and from any foreign country to any State or Territory or the District of Columbia.¹

In this section Congress does not define interstate commerce, but only declares that the territories and the District of Columbia should be included in the term " interstate commerce " as well as the various States.² Commerce is considered as including the transportation of persons and property, and the Act condemns aiding, inducing, or obtaining transportation in interstate commerce for immoral purposes.³

§ 1106. Transporting, etc., Females for Immoral Practices a Felony — Furnishing Tickets, etc., Included — Punishment.

Section 2 of the White-slave Traffic Act provides :

That any person who shall knowingly transport or cause to be transported, or aid or assist in obtaining transportation for, or in transporting, in interstate or foreign commerce, or in any Territory or in the District of Columbia, any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice, or compel such woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice ; or who shall knowingly procure or obtain, or cause to be procured or obtained, or aid or assist in procuring or obtaining, any ticket or tickets, or any form of transportation or evidence of the right thereto, to be used by any woman or girl in interstate or foreign commerce, or in any Territory or the District of Columbia, in going to any place for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent or purpose on the part of such person to induce, entice, or compel her

§ 1105. ¹ Act of June 25, 1910, c. 395, § 1, 36 Stat. L. 825.

² United States v. Burch, 226 Fed. 974.

³ Hoke v. United States, 227 U. S. 308, 57 L. ed. 523, 33 S. C. 281.

§ 1106. ¹ Act of June 25, 1910, c. 395, § 2, 36 Stat. L. 825.

to give herself up to the practice of prostitution, or to give herself up to debauchery, or any other immoral practice, whereby any such woman or girl shall be transported in interstate or foreign commerce, or in any Territory or the District of Columbia, shall be deemed guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding five thousand dollars, or by imprisonment of not more than five years or by both such fine and imprisonment, in the discretion of the court.¹

§ 1107. Constitutionality.

This statute is constitutional and does not infringe on the powers reserved to the States under the Constitution.¹

§ 1108. Scope.

A German naval officer who violated this act while Germany was at peace with the United States and who was interned for the duration of the war may be prosecuted.¹ In one case,² the Supreme Court of the United States held that this section applies to any case where a woman is transported for purposes of prostitution, regardless of whether pecuniary gain was a motive. In another case,³ the court held that the crime is consummated when any woman or girl, transported for purposes of prostitution, reaches her destination, and it is immaterial that the defendant refused to accept the girl when she reached the designated place, as there can be no *locus penitentiae* to undo a crime once it has been consummated. It follows as a result of the interpretation in the two previous cases that it is in violation of this Act to transport a girl from one State to another with the intention of making her a

§ 1107. ¹ Athanasaw v. United States, 227 U. S. 326, 57 L. ed. 528, 33 S. C. 285; Hoke v. United States, 227 U. S. 308, 57 L. ed. 523, 33 S. C. 281; Bennett v. United States, 227 U. S. 333, 57 L. ed. 531, 33 S. C. 288; Harris v. United States, 227 U. S. 340, 57 L. ed. 534, 33 S. C. 289; Wilson v. United States, 232 U. S. 563, 58 L. ed. 728, 34 S. C. 347; Kalen v. United States, 196 Fed. 888, 116 C. C. A. 450 (9th Cir.); Paulsen

v. United States, 199 Fed. 423, 118 C. C. A. 97 (9th Cir.); United States v. Westman, 182 Fed. 1017; United States v. Warner, 188 Fed. 682; United States v. Vaughn, 209 Fed. 719.

§ 1108. ¹ United States v. Thierichers, 243 Fed. 419.

² Caminetti v. United States, 242 U. S. 47, 61 L. ed. 442, 37 S. C. 192.

³ United States v. Wilson, 232 U. S. 563, 58 L. ed. 728, 34 S. C. 347.

mistress.⁴ And it has been held that the previous good character of the woman is of no importance.⁵ The statute does not merely forbid the transportation in interstate commerce for purposes of prostitution, but makes it a crime whenever the transportation has for its purpose any kind of sexual immorality.⁶ It does not, however, include indiscretions committed after arrival, if the transportation was originally for a lawful purpose. Debauchery is defined as a life eventually leading, or tending to lead, to sexual immorality and is used in the sense of unlawful indulgence of lust.⁷ It was accordingly held that inducing a woman to go to another country to dance with men in a house of prostitution is within the Act⁸ and the defendant was convicted though he had specifically forbidden the woman to engage in prostitution. In *Athanasaw v. United States*,⁹ the defendant contracted with the prosecuting witness to play in a theatre in another state. On arriving there she found the environment most unwholesome. The court held the defendant guilty because he knew when he contracted with the girl that she would be placed in a condition that would necessarily and ultimately lead to a life of debauchery. The doctrine of *locus penitentiae* cannot be invoked in an indictment under the White Slave Act after the woman has reached the house of prostitution.¹⁰

§ 1109. Means of Transportation.

The prohibition is not restricted merely to transportation by a common carrier.¹ Transporting a woman from one State to another by automobile comes within the statute,² but a wholly intrastate transaction is not within the statute.³

⁴ *Diggs v. United States*, 220 Fed. 545, 136 C. C. A. 149 (9th Cir.); *Flaspoller v. United States*, 205 Fed. 1006.

⁵ *Suslak v. United States*, 213 Fed. 913, 130 C. C. A. 391 (9th Cir.).

⁶ *Diggs v. United States*, *supra*; *Johnson v. United States*, 215 Fed. 679, 131 C. C. A. 613 (7th Cir.). See note 2, § 1114, *infra*.

⁷ *Athanasaw v. United States*, 227 U. S. 326, 57 L. ed. 528, 33 S. C. 285; *Suslak v. United States*, *supra*; *Van Pelt v. United States*, 240 Fed. 346, 153 C. C. A. 272 (4th Cir.).

⁸ *Beyer v. United States*, 251 Fed. 39, 163 C. C. A. 289 (9th Cir.).

⁹ 227 U. S. 326, 57 L. ed. 528, 33 S. C. 285.

¹⁰ *Wilson v. United States*, 232 U. S. 563, 58 L. ed. 728, 34 S. C. 247.

§ 1109. ¹ *Wilson v. United States*, 232 U. S. 563, 58 L. ed. 728, 33 S. C. 285.

² *United States v. Burch*, 226 Fed. 974.

³ *Shaffner v. United States*, 244 Fed. 140, 145, 156 C. C. A. 568 (7th Cir.).

§ 1110. **Agency.**

A person who asks another to transport a girl in interstate commerce for immoral purposes is violating this Act. The general rules of agency as to the agent's authority are applicable.¹ A person who gives money to an agent with which to defray the railroad expenses in transporting the female for immoral purposes is clearly guilty.²

§ 1111. **Witnesses — Accomplices.**

It has been held that a woman can be guilty of conspiring to have herself unlawfully transported in interstate commerce for purposes of prostitution and be prosecuted under Section 37 of the Penal Code,¹ but she cannot be an accomplice, because when a penal statute is intended for the protection of a particular class of persons one of that class does not become an accomplice by submitting to the injury.² In view of the decision in *United States v. Holte*,³ a female who has been transported in interstate commerce may refuse to testify for the government on the ground that she would be incriminating herself. A conviction may rest on the uncorroborated testimony of a co-conspirator or accomplice.⁴ A wife is a competent witness against her husband when he is charged with transporting her in interstate commerce for immoral purposes. These cases come within the common law exception permitting a woman to testify against her husband when the offense is directed against her person.⁵ But if this

§ 1110. ¹ *Wilson v. United States*, 232 U. S. 563, 58 L. ed. 728, 34 S. C. 347.

² *Heitler v. United States*, 244 Fed. 140, 156 C. C. A. 568 (7th Cir.).

§ 1111. ¹ *United States v. Holte*, 236 U. S. 140, 59 L. ed. 504, 35 S. C. 271.

² *Diggs v. United States*, 220 Fed. 545, 553, 136 C. C. A. 149 (9th Cir.).

³ 236 U. S. 140, 59 L. ed. 504, 35 S. C. 271.

⁴ *Heitler v. United States*, 244 Fed. 140, 156 C. C. A. 568 (7th

Cir.); *Diggs v. United States*, 220 Fed. 548, 136 C. C. A. 149 (9th Cir.). *Affirmed* in 242 U. S. 470, 61 L. ed. 442, 37 S. C. 192.

⁵ *Denning v. United States*, 247 Fed. 463, 159 C. C. A. 517 (5th Cir.); *Pappas v. United States*, 241 Fed. 665, 154 C. C. A. 423 (9th Cir.); *United States v. Bozeman*, 236 Fed. 432; *Cohen v. United States*, 214 Fed. 23, 130 C. C. A. 417 (9th Cir.). *Certiorari denied*, 235 U. S. 696, 59 L. ed. 430, 35 S. C. 199. *Contra*: *Johnson v. United States*, 221 Fed. 250, 137 C. C. A. 106 (8th Cir.).

injury was inflicted on the wife prior to coverture, then she is not a competent witness.⁶

§ 1112. Inducing, etc., Transportation of Women for Immoral Purposes a Felony — Punishment.

Section 3 of the White-slave Traffic Act provides :

That any person who shall knowingly persuade, induce, entice, or coerce, or cause to be persuaded, induced, enticed, or coerced, or aid or assist in persuading, inducing, enticing, or coercing any woman or girl to go from one place to another in interstate or foreign commerce, or in any Territory or the District of Columbia, for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose on the part of such person that such woman or girl shall engage in the practice of prostitution or debauchery, or any other immoral practice, whether with or without her consent, and who shall thereby knowingly cause or aid or assist in causing such woman or girl to go and to be carried or transported as a passenger upon the line or route of any common carrier or carriers in interstate or foreign commerce, or any Territory or the District of Columbia, shall be deemed guilty of a felony and on conviction thereof shall be punished by a fine of not more than five thousand dollars or by imprisonment for a term not exceeding five years, or by both such fine and imprisonment, in the discretion of the court.¹

§ 1113. Scope.

This section is similar to Section 2 in its general application, except that it covers cases in which the defendant has persuaded the girl to be transported instead of actually transporting her. It was therefore correctly held that inducing a woman to leave this country and go to another to manage a house of prostitution comes within the prohibition of this statute.¹

§ 1114. Witnesses in General.

In a prosecution for persuading a woman to go from one State

⁶ *United States v. Gwynne*, 209 Fed. 993.

§ 1112. ¹ Act of June 25, 1910, c. 395, § 3, 36 Stat. L. 825. See notes under §§ 1108 and 1114.

§ 1113. ¹ *Simpson v. United States*, 245 Fed. 278, 157 C. C. A. 470 (9th Cir.). *Certiorari denied*, 245 U. S. 667, 62 L. ed. 538, 38 S. C. 133.

to another in interstate commerce with the intention that she engage in debauchery, the court held that the woman, who was the defendant's wife, could testify against him.¹ If one assists in the transportation of a female for a lawful purpose but possesses the private intention to have intercourse with her when she will have reached her destination, he cannot be prosecuted under this section. The Circuit Court of Appeals reversed a judgment holding the defendant guilty because the trial court had instructed the jury that the private intention of the defendant would determine his guilt.²

§ 1115. Inducing, etc., Interstate Transportation of Females under Eighteen for Immoral Practices a Felony Punishment.

Section 4 of the White-slave Traffic Act provides :

That any person who shall knowingly persuade, induce, entice, or coerce any woman or girl under the age of eighteen years from any State or Territory or the District of Columbia to any other State or Territory or the District of Columbia, with the purpose and intent to induce or coerce her, or that she shall be induced or coerced to engage in prostitution or debauchery, or any other immoral practice, and shall in furtherance of such purpose knowingly induce or cause her to go and to be carried or transported as a passenger in interstate commerce upon the line or route of any common carrier or carriers, shall be deemed guilty of a felony, and on conviction thereof shall be punished by a fine of not more than ten thousand dollars, or by imprisonment for a term not exceeding ten years, or by both such fine and imprisonment, in the discretion of the court.¹

This section has been held to be constitutional.² Knowledge on the part of the woman as to the purpose for which she is being brought into another State is not one of the elements of the offense defined by this section.³

§ 1114. ¹ United States v. Rispoli, 189 Fed. 271.

² Welsch v. United States, 220 Fed. 764, 136 C. C. A. 378 (4th Cir.).

§ 1115. ¹ Act of June 25, 1910, c. 395, § 4, 36 Stat. L. 826.

² Kalen v. United States, 196 Fed. 888, 116 C. C. A. 450 (9th Cir.).

³ Pordjun v. United States, 237 Fed. 799, 151 C. C. A. 41 (6th Cir.).

§ 1116. Jurisdiction of Courts.

Section 5 of the White-slave Traffic Act provides:

That any violation of any of the above sections two, three, and four shall be prosecuted in any court having jurisdiction of crimes within the district in which said violation was committed, or from, through, or into which any such woman or girl may have been carried or transported as a passenger in interstate or foreign commerce, or in any Territory or the District of Columbia, contrary to the provisions of any of said sections.¹

This section regulates the venue of the trial. The accused can be tried in any district from, through, or into which the transportation led.²

§ 1117. Alien Prostitutes — Information Bureau Established — Authority of Commissioner-General of Immigration — Statements of Alien Females.

Section 6 [A] of the White-slave Traffic Act provides:

That for the purpose of regulating and preventing the transportation in foreign commerce of alien women and girls for purposes of prostitution and debauchery, and in pursuance of and for the purpose of carrying out the terms of the agreement or project of arrangement for the suppression of the white-slave traffic, adopted July twenty-fifth, nineteen hundred and two, for submission to their respective governments by the delegates of various powers represented at the Paris conference and confirmed by a formal agreement signed at Paris on May eighteenth, nineteen hundred and four, and adhered to by the United States on June sixth, nineteen hundred and eight, as shown by the proclamation of the President of the United States, dated June fifteenth, nineteen hundred and eight, the Commissioner-General of Immigration is hereby designated as the authority of the United States to receive and centralize information concerning the procurement of alien women and girls with a view to their debauchery, and to

§ 1116. ¹ Act of June 25, 1910, c. Fed. 679, 131 C. C. A. 613 (7th Cir.);
395, § 5, 36 Stat. L. 826. Yeates v. United States, 254 Fed.

² Johnson v. United States, 215 60 — C. C. A. — (5th Cir.).

exercise supervision over such alien women and girls, receive their declarations, establish their identity, and ascertain from them who induced them to leave their native countries, respectively; and it shall be the duty of said Commissioner-General of Immigration to receive and keep on file in his office the statements and declarations which may be made by such alien women and girls, and those which are hereinafter required pertaining to such alien women and girls engaged in prostitution or debauchery in this country, and to furnish receipts for such statements and declarations provided for in this act to the persons, respectively, making and filing them.¹

§ 1118. Statement of Alien Inmates by Keepers of Houses of Prostitution — Failure to File Statement — Making False Statement — Failure to Disclose Facts in Statement — Penalty.

Section 6 [B] of the White-slave Traffic Act provides :

Every person who shall keep, maintain, control, support, or harbor in any house or place for the purpose of prostitution, or for any other immoral purpose, any alien woman or girl within three years after she shall have entered the United States from any country, party to the said arrangement for the suppression of the white-slave traffic, shall file with the Commissioner-General of Immigration a statement in writing setting forth the name of such alien woman or girl, the place at which she is kept, and all facts as to the date of her entry into the United States, the port through which she entered, her age, nationality, and parentage, and concerning her procurement to come to this country within the knowledge of such person, and any person who shall fail, within thirty days after such person shall commence to keep, maintain, control, support, or harbor in any house or place for the purpose of prostitution, or for any other immoral purpose, any alien woman or girl within three years after she shall have entered the United States from any of the countries, party to the said arrangement for the suppression of the white-slave traffic, to file such statement concerning such alien woman or girl with the Commissioner-General of Immigration, or who shall knowingly and will-

§ 1117. ¹ Act of June 25, 1910, c. 395, § 6 (A), 36 Stat. L. 826.

fully state falsely or fail to disclose in such statement any fact within his knowledge or belief with reference to the age, nationality, or parentage of any such alien woman or girl, or concerning her procuration to come to this country, shall be deemed guilty of a misdemeanor, and on conviction shall be punished by a fine of not more than two thousand dollars, or by imprisonment for a term not exceeding two years, or by both such fine and imprisonment, in the discretion of the court.¹

§ 1119. Presumption from Failure to File Statement — Self-Incrimination as Excuse for Failure to File Statement — Immunity for Truthful Statements.

Section [6] C of the White-slave Traffic Act provides :

In any prosecution brought under this section, if it appear that any such statement required is not on file in the office of the Commissioner-General of Immigration, the person whose duty it shall be to file such statement shall be presumed to have failed to file said statement, as herein required, unless such person or persons shall prove otherwise. No person shall be excused from furnishing the statement, as required by this section, on the ground or for the reason that the statement so required by him, or the information therein contained, might tend to criminate him or subject him to a penalty or forfeiture, but no person shall be prosecuted or subjected to any penalty or forfeiture under any law of the United States for or on account of any transaction, matter, or thing, concerning which he may truthfully report in such statement, as required by the provisions of this section.¹

§ 1120. Immunity — Place of Trial.

Congress grants immunity from prosecution under the laws of the United States for any matter truthfully reported under this section. The place of trial for failure to file the statement provided for in the Act is the city of Washington, D.C., and no other place.¹

§ 1118. ¹ Act of June 25, 1910, c. 395, § 6 (B), 36 Stat. L. 826. *See* Keller v. United States, 213 U.S. 138, 53 L. ed. 737, 29 S. C. 470, holding an earlier act unconstitutional.

§ 1119. ¹ Act of June 25, 1910, c. 395, § 6 (C), 36 Stat. L. 826.

§ 1120. ¹ United States v. Lombardo, 228 Fed. 980, *affirmed* 241 U. S. 73, 60 L. ed. 897, 36 S. C. 508.

§ 1121. Application of the Law.

The United States Supreme Court construed this section to apply to anyone who harbors a prostitute regardless of whether that person was instrumental in bringing the prostitute into the United States, but the court distinctly says that this decision merely determines to whom the section applies and does not aim to pass on the statute in general.¹ This section applies only to aliens coming from countries that are parties to the treaty. An indictment which does not allege that the alien so harbored is from one of the countries, parties to the treaty, is fatally defective.²

§ 1122. Alaska, Insular Possessions, and Canal Zone Included in "Territory" — "Person" Construed — Corporations, etc., Responsible for Agents, etc.

Section 7 of the White-slave Traffic act provides :

That the term "Territory", as used in this Act, shall include the district of Alaska, the insular possessions of the United States, and the Canal Zone. The word "person", as used in this Act, shall be construed to import both the plural and the singular, as the case demands, and shall include corporations, companies, societies, and associations. When construing and enforcing the provisions of this Act, the act, omission, or failure of any officer, agent, or other person, acting for or employed by any other person or by any corporation, company, society, or association within the scope of his employment or office, shall in every case be also deemed to be the act, omission, or failure of such other person, or of such company, corporation, society, or association, as well as that of the person himself.¹

§ 1123. Title of Act.

Section 8 of the White-slave Traffic Act provides :

That this Act shall be known and referred to as the "White-slave Traffic Act."¹

§ 1121. ¹ United States v. Portale, 235 U. S. 27, 59 L. ed. 111, 35 S. C. 1.

² United States v. Davin, 189 Fed. 244.

§ 1122. ¹ Act of June 25, 1910, c. 395, § 7, 36 Stat. L. 827.

§ 1123. ¹ Act of June 25, 1910, c. 395, § 8, 36 Stat. L. 827.

CHAPTER LXVII

CRIMINAL LIABILITY UNDER NATIONAL BANK ACT AND FEDERAL RESERVE ACT

- § 1124. Criminal Statutes Relating to National and Federal Reserve Banks.
- § 1125. Falsely Certifying Checks.
- § 1126. Application to Federal Reserve Banks.
- § 1127. Two Sections Must Be Read Together.
- § 1128. Punishment for Falsely Certifying Checks.
- § 1129. What Constitutes Certification.
- § 1130. Form of Certification.
- § 1131. Willful Wrongdoing Essential.
- § 1132. Text of the Statute.
- § 1133. Exclusive Jurisdiction.
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- § 1137. Agent in Liquidation of Bank.
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- § 1180. Variance.
- § 1181. Evidence.
- § 1182. Coupled with Section 5440.
- § 1183. Loans or Gratuities to Bank Examiners — Fees to Directors and Other Officers — Disclosure of Loans by Examiners.

§ 1124. Criminal Statutes Relating to National and Federal Reserve Banks.

The criminal provisions of the Federal statutes applying to national banks are contained in Sections 5208 and 5209 of the Revised Statutes, the former section relating to falsely certifying checks and the latter to embezzlement, abstraction, misapplication, false entries in books and reports by officers of the bank and the aiding and abetting of these offenses. By successive amendments to the Federal Reserve Act, these sections, slightly altered, have been made to apply to all Federal Reserve banks and member banks, as shown in the following sections of this work.

§ 1125. Falsely Certifying Checks.

Section 5208, Revised Statutes, makes it unlawful for any officer, clerk, or agent of any national banking association to

certify any check drawn upon the association unless the person or company drawing the check has on deposit with the association, at the time the check is certified, an amount of money equal to the amount specified in the check. Any check so certified by duly authorized officers is a good and valid obligation against the association; but the act of any officer, clerk, or agent of any association, in violation of this section, subjects the bank to the liabilities and proceedings on the part of the Comptroller provided for in Section 5234, relating to receiverships. By Section 9 of the Federal Reserve Act, as amended by Section 3 of the Act of June 21, 1917, the provisions of this section were made to apply to any bank admitted to membership in a Federal Reserve bank, the penalty as to the bank being that the act of false certification "may subject such bank to a forfeiture of its membership in the Federal Reserve System upon hearing by the Federal Reserve Board."

§ 1126. Application to Federal Reserve Banks.

Section 5208 was amended by Section 7 of the Act of Congress of September 26, 1918, c. 177, so as to apply to Federal Reserve banks and member banks, and now reads as follows:

Section 5208. It shall be unlawful for any officer, director, agent, or employee of any Federal Reserve bank, or of any member bank as defined in the Act of December 23, 1913, known as the Federal Reserve Act, to certify any check drawn upon such Federal Reserve bank or member bank unless the person, firm or corporation drawing the check has on deposit with such Federal Reserve bank or member bank, at the time such check is certified, an amount of money not less than the amount specified in such check. Any check so certified by a duly authorized officer, director, agent or employee shall be a good and valid obligation against such Federal Reserve bank or member bank; but the act of any such Federal Reserve bank or member bank in violation of this section, shall in the discretion of the Federal Reserve Board subject such Federal Reserve Bank to the penalties imposed by section eleven, subsection (*h*) of the Federal Reserve Act, and shall subject such member bank if a national bank to the liabilities and

proceedings on the part of the Comptroller of the Currency, provided for in Section 5234, Revised Statutes, and shall, in the discretion of the Federal Reserve Board, subject any other member bank to the penalties imposed by section nine of said Federal Reserve Act for the violation of any of the provisions of said Act. Any officer, director, agent, or employee of any Federal Reserve bank or member bank who shall willfully violate the provisions of this section or who shall resort to any device, or receive any fictitious obligation, directly or collaterally, in order to evade the provisions thereof, or who shall certify a check before the amount thereof shall have been regularly entered to the credit of the drawer upon the books of the bank, shall be deemed guilty of a misdemeanor and shall, on conviction thereof in any district court of the United States, be fined not more than \$5000 or shall be imprisoned for not more than five years, or both, in the discretion of the court.

§. 1127. Two Sections Must Be Read Together.

Section 5208 does not create any criminal offense. This section and Section 13 of Act July 12, 1882, c. 290, must be read together, and when so read they denounce but one crime, not two crimes. The one crime denounced is certifying a check under either (a) two sets of circumstances, or (b) one set of circumstances described in two ways.¹ If requested by counsel, this must be explained to the jury.² In order to sustain a charge of acting by others, the government must prove that the individuals who actually executed the certification indorsement were but the defendant's physical instruments, and acted in accordance with his orders.³

§ 1128. Punishment for Falsely Certifying Checks.

Section 13 of the Act of July 12, 1882, provides :

That any officer, clerk, or agent of any national bank association willfully violating Section 5208, Revised Statutes, or resorting to any device or receiving any fictitious obli-

§ 1127. ¹ United States v. Heinze, 161 Fed. 425; Spurr v. United States, 174 U. S. 728, 43 L. ed. 1150, 19 S. C. 812.

² Spurr v. United States, *supra*.

³ United States v. Heinze, *supra*.

gation, direct or collateral, to evade its provisions, or certifying checks before the amount thereof has been regularly entered to the credit of the dealer upon the books of the banking association, is guilty of a misdemeanor, punishable by fine of not more than \$5000 or imprisonment for not more than 5 years, or both.

§ 1129. What Constitutes Certification.

The word "certify", as commonly understood, implies that the check upon which the words of certification have been written, has passed from the custody of the bank and into the hands of some other party, and when the charge is that the defendant "did unlawfully, knowingly and willfully certify a certain cheque" (describing it) the import of the accusation is not simply that he wrote certain words on the face of the check, but that he did it in such a manner as to create an obligation of the bank; in such a way as to make an instrument which could properly be called a certified check.¹

§ 1130. Form of Certification.

No particular form is required for the certification. Ordinarily this is done by simply writing the word "good" upon the face of the check, adding thereto the signature or initials of the certifying officer. But any language employed by such officer, importing that the check is good and will be paid, would seem to be sufficient.¹

§ 1131. Willful Wrongdoing Essential.

While the language of the statute is not always sufficient to describe such an offense, if such language is, according to the natural import of the words, fully descriptive of the offense, ordinarily that is sufficient in an indictment. "Willful" wrong is of the essence of the accusation. The language of the statute implies knowledge on the part of the officer and a purpose to do wrong. Something more is required than an act of certification made in excess of the actual deposit, but in ignorance of that

§ 1129. ¹ Potter v. United States, 155 U. S. 438, 444, 39 L. ed. 214, 15 S. C. 144.

§ 1130. ¹ National Banking Associations, 17 Ops. Atty.-Gen. 471.

fact or without any purpose to evade or disobey the mandates of the law.¹ Therefore, a person charged with the offense is entitled to have submitted to the jury on the question of "willful" wrongdoing evidence of an agreement on the part of the officers of the bank that it should be treated as a loan from day to day, secured by ample collateral, and that for the check certified each day there was deposited each day an ample amount of cash.² Where a bank officer certifies a check in good faith, relying on information received from the cashier and exchange clerk that there was a sufficient deposit, he is not criminally liable, nor where he in fact supposes an arrangement as to overdrafts to be equivalent to a loan and certifies the check on a special deposit of funds to meet it.³ But if an officer certifies a check with the intent that the drawer shall obtain so much money out of the bank when he has none there, such officer not only certifies unlawfully, but the specific intent to violate the statute may be imputed. And so evil design may be presumed if the officer purposely keeps himself in ignorance of whether the drawer has money in the bank or not, or is grossly indifferent to his duty in respect to the ascertainment of the fact.⁴

§ 1132. Text of the Statute.

Section 5209, Revised Statutes, provides as follows:

Every president, director, teller, clerk, or agent of any association, who embezzles, abstracts or willfully misapplies any of the moneys, funds, or credits of the association; or who, without authority from the directors, issues or puts in circulation any of the notes of the association; or who, without such authority, issues or puts forth any certificate of deposit, draws any order or bill of exchange, makes any acceptance, assigns any note, bond, draft, bill of exchange, makes any acceptance, assigns any note, bond, draft, bill of exchange, mortgage, judgment or decree; or who makes any false entry in any book, report or statement of the association, with intent, in either case, to injure or defraud

§ 1131. ¹ *Potter v. United States*, 155 U. S. 438, 39 L. ed. 214, 15 S. C. 144.

² *Potter v. United States, supra.*

³ *Spurr v. United States*, 174 U. S. 728, 43 L. ed. 1150, 19 S. C. 812; *Potter v. United States, supra.*

⁴ *Spurr v. United States, supra.*

the association or any other company, body politic or corporate, or any individual person, or to deceive any officer of the association, or any agent appointed to examine the affairs of any such association; and every person who with like intent, aids or abets any officer, clerk, or agent in any violation of this section, shall be deemed guilty of a misdemeanor and shall be imprisoned not less than five years nor more than ten.

Section 5209 was amended by section 7 of the Act of Congress of September 26, 1918, c. 177, so as to apply to Federal Reserve Banks and member banks; and now reads as follows:

Sec. 5209. Any officer, director, agent, or employee of any Federal reserve bank, or of any member bank as defined in the Act of December 23, 1913, known as the Federal Reserve Act, who embezzles, abstracts, or willfully misapplies any of the moneys, funds or credits of such Federal reserve bank or member bank, or who, without authority from the directors of such Federal reserve bank or member bank, issues or puts in circulation any of the notes of such Federal reserve bank or member bank, or who, without such authority, issues or puts forth any certificates of deposit, draws any order or bill of exchange, makes any acceptance, assigns any note, bond, draft, bill of exchange, mortgage, judgment, or decree, or who makes any false entry in any book, report, or statement of such Federal reserve bank or member bank, with intent in any case to injure or defraud such Federal reserve bank, or member bank, or any other company, body politic or corporate, or any individual person, or to deceive any officer of such Federal reserve bank, or member bank, or the Comptroller of the Currency, or any agent or examiner appointed to examine the affairs of such Federal reserve bank or member bank, or the Federal Reserve Board; and every receiver of a national banking association who, with like intent to defraud or injure, embezzles, abstracts, purloins, or willfully misapplies any of the moneys, funds, or assets of his trust, and every person who, with like intent, aids or abets any officer, director, agent, employee, or receiver in any violation of this section shall be deemed guilty of a misdemeanor, and upon conviction

thereof in any district court of the United States shall be fined not more than \$5000 or shall be imprisoned for not more than five years, or both, in the discretion of the court. Any Federal reserve agent, or any agent or employee of such Federal reserve agent, or of the Federal Reserve Board, who embezzles, abstracts, or willfully misapplies any moneys, funds, or securities intrusted to his care, or without complying with or in violation of the provisions of the Federal reserve Act, issues or puts in circulation any Federal reserve notes shall be guilty of a misdemeanor and upon conviction in any district court of the United States shall be fined not more than \$5000 or imprisoned for not more than five years, or both, in the discretion of the court.

There are other Federal penal provisions affecting banks. They are as follows: Section 2 of the Federal Reserve Act as amended September 26, 1918, is as follows:

To grant by special permit to national banks applying therefor, when not in contravention of State or local law, the right to act as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, committee of estates of lunatics, or in any other fiduciary capacity in which State banks, trust companies, or other corporations which come into competition with national banks are permitted to act under the laws of the State in which the national bank is located.

Whenever the laws of such State authorize or permit the exercise of any or all of the foregoing powers by State banks, trust companies, or other corporations which compete with national banks, the granting to and the exercise of such powers by national banks shall not be deemed to be in contravention of State or local law within the meaning of this Act.

National banks exercising any or all of the powers enumerated in this subsection shall segregate all assets held in any fiduciary capacity from the general assets of the bank and shall keep a separate set of books and records showing in proper detail all transactions engaged in under authority of this subsection. Such books and records shall be

open to inspection by the State authorities to the same extent as the books and records of corporations organized under State law which exercise fiduciary powers, but nothing in this Act shall be construed as authorizing the State authorities to examine the books, records, and assets of the national bank which are not held in trust under authority of this subsection.

No national bank shall receive in its trust department deposits of current funds subject to check or the deposit of checks, drafts, bills of exchange, or other items for collection or exchange purposes. Funds deposited or held in trust by the bank awaiting investment shall be carried in a separate account and shall not be used by the bank in the conduct of its business unless it shall first set aside in the trust department United States bonds or other securities approved by the Federal Reserve Board.

In the event of the failure of such bank the owners of the funds held in trust for investment shall have a lien on the bonds or other securities so set apart in addition to their claim against the estate of the bank.

Whenever the laws of a State require corporations acting in a fiduciary capacity, to deposit securities with the State authorities for the protection of private or court trust, national banks so acting shall be required to make similar deposits and securities so deposited shall be held for the protection of private or court trusts, as provided by the State law.

National banks in such cases shall not be required to execute the bond usually required of individuals if State corporations under similar circumstances are exempt from this requirement.

National banks shall have power to execute such bond when so required by the laws of the State.

In any case in which the laws of a State require that a corporation acting as trustee, executor, administrator, or in any capacity specified in this section, shall take an oath or make an affidavit, the president, vice president, cashier, or trust officer of such national bank may take the necessary oath or execute the necessary affidavit.

It shall be unlawful for any national banking association to lend any officer, director, or employee any funds held

in trust under the powers conferred by this section. Any officer, director, or employee making such loan, or to whom such loan is made, may be fined not more than \$5000, or imprisoned not more than five years, or may be both fined and imprisoned, in the direction of the court.

In passing upon applications for permission to exercise the powers enumerated in this subsection, the Federal Reserve Board may take into consideration the amount of capital and surplus of the applying bank, whether or not such capital and surplus is sufficient under the circumstances of the case, the needs of the community to be served, and any other facts and circumstances that seem to it proper, and may grant or refuse the application accordingly: *Provided*, That no permit shall be issued to any national banking association having a capital and surplus less than the capital and surplus required by State law of State banks, trust companies, and corporations exercising such powers.

Section 5 of the same act as amended by the said act of September 26, 1918, is as follows:

That section twenty-two of the Federal Reserve Act, as amended by the Act of June twenty-first, nineteen hundred and seventeen, be further amended and reenacted to read as follows:

(a) No member bank and no officer, director, or employee thereof shall hereafter make any loan or grant any gratuity to any bank examiner. Any bank officer, director, or employee violating this provision shall be deemed guilty of a misdemeanor and shall be imprisoned not exceeding one year or fined not more than \$5000, or both; and may be fined a further sum equal to the money so loaned or gratuity given.

Any examiner accepting a loan or gratuity from any bank examined by him or from an officer, director, or employee thereof shall be deemed guilty of a misdemeanor and shall be imprisoned one year or fined not more than \$5000, or both, and may be fined a further sum equal to the money so loaned or gratuity given, and shall forever thereafter be disqualified from holding office as a national bank examiner.

(b) No national bank examiner shall perform any other service for compensation while holding such office for any bank or officer, director, or employee thereof.

No examiner, public or private, shall disclose the names of borrowers or the collateral for loans of a member bank to other than the proper officers of such bank without first having obtained the express permission in writing from the Comptroller of the Currency, or from the board of directors of such bank, except when ordered to do so by a court of competent jurisdiction, or by direction of the Congress of the United States, or of either House thereof, or any committee of Congress, or of either House duly authorized. Any bank examiner violating the provisions of this subsection shall be imprisoned not more than one year or fined not more than \$5000, or both.

(c) Except as herein provided, any officer, director, employee, or attorney of a member bank who stipulates for or receives or consents or agrees to receive any fee, commission, gift, or thing of value from any person, firm, or corporation, for procuring or endeavoring to procure for such person, firm, or corporation, or for any other person, firm, or corporation, any loan from or the purchase or discount of any paper, note, draft, check, or bill of exchange by such member bank shall be deemed guilty of a misdemeanor and shall be imprisoned not more than one year or fined not more than \$5000, or both.

(d) Any member bank may contract for, or purchase from, any of its directors or from any firm of which any of its directors is a member, any securities or other property, when (and not otherwise) such purchase is made in the regular course of business upon terms not less favorable to the bank than those offered to others, or when such purchase is authorized by a majority of the board of directors not interested in the sale of such securities or property, such authority to be evidenced by the affirmative vote or written assent of such directors: *Provided, however,* That when any director, or firm of which any director is a member, acting for or on behalf of others, sell securities or other property to a member bank, the Federal Reserve Board by regulation may, in any or all cases, require a full disclosure to be made, on forms to be prescribed by it, of all

commission or other considerations received, and whenever such director or firm, acting in his or its own behalf, sells securities or other property to the bank the Federal Reserve Board, by regulation, may require a full disclosure of all profit realized from such sale.

Any member bank may sell securities or other property to any of its directors, or to a firm of which any of its directors is a member, in the regular course of business on terms not more favorable to such director or firm than those offered to others, or when such sale is authorized by a majority of the board of directors of a member bank to be evidenced by their affirmative vote or written assent: *Provided, however,* That nothing in this subsection contained shall be construed as authorizing member banks to purchase or sell securities or other property which such banks are not otherwise authorized by law to purchase or sell.

(e) No member bank shall pay to any director, officer, attorney, or employee a greater rate of interest on the deposits of such director, officer, attorney, or employee than that paid to other depositors on similar deposits with such member bank.

(f) If the directors or officers of any member bank shall knowingly violate or permit any of the agents, officers, or directors of any member bank to violate any of the provisions of this section or regulations of the board made under authority thereof, every director and officer participating in or assenting to such violation shall be held liable in his personal and individual capacity for all damages which the member bank, its shareholders, or any other persons, shall have sustained in consequence of such violation.

Further criminal provisions have been provided for by the act of December 24, 1919, amending Section 25 of the Federal Reserve Act, which is as follows:

An Act To amend the Act approved December 23, 1913, known as the Federal Reserve Act.

[*Act of Dec. 24, 1919.*]

[Corporations to do foreign banking business — creation — powers — rights and liabilities of officers and stock-

holders.] That the Act approved December 23, 1913, known as the Federal Reserve Act, as amended, be further amended by adding a new section as follows:

BANKING CORPORATIONS AUTHORIZED TO DO FOREIGN BANKING BUSINESS.

SEC. 25 (a). Corporations to be organized for the purpose of engaging in international or foreign banking or other international or foreign financial operations, or in banking or other financial operations in a dependency or insular possession of the United States, either directly or through the agency, ownership, or control of local institutions in foreign countries, or in such dependencies or insular possessions as provided by this section, and to act when required by the Secretary of the Treasury as fiscal agents of the United States, may be formed by any number of natural persons, not less in any case than five.

Such persons shall enter into articles of association which shall specify in general terms the objects for which the association is formed and may contain any other provisions not inconsistent with law which the association may see fit to adopt for the regulation of its business and the conduct of its affairs.

Such articles of association shall be signed by all of the persons intending to participate in the organization of the corporation and, thereafter, shall be forwarded to the Federal Reserve Board and shall be filed and preserved in its office. The persons signing the said articles of association shall, under their hands, make an organization certificate which shall specifically state:

First. The name assumed by such corporation, which shall be subject to the approval of the Federal Reserve Board.

Second. The place or places where its operations are to be carried on.

Third. The place in the United States where its home office is to be located.

Fourth. The amount of its capital stock and the number of shares into which the same shall be divided.

Fifth. The names and places of business or residence of the persons executing the certificate and the number of shares to which each has subscribed.

Sixth. The fact that the certificate is made to enable the persons subscribing the same, and all other persons, firms, companies, and corporations, who or which may thereafter subscribe to or purchase shares of the capital stock of such corporation, to avail themselves of the advantages of this section.

The persons signing the organization certificate shall duly acknowledge the execution thereof before a judge of some court of record or notary public, who shall certify thereto under the seal of such court or notary, and thereafter the certificate shall be forwarded to the Federal Reserve Board to be filed and preserved in its office. Upon duly making and filing articles of association and an organization certificate, and after the Federal Reserve Board has approved the same and issued a permit to begin business, the association shall become and be a body corporate, and as such and in the name designated therein shall have power to adopt and use a corporate seal, which may be changed at the pleasure of its board of directors; to have succession for a period of twenty years unless sooner dissolved by the act of the shareholders owning two-thirds of the stock or by an Act of Congress or unless its franchises become forfeited by some violation of law; to make contracts; to sue and be sued, complain, and defend in any court of law or equity; to elect or appoint directors, all of whom shall be citizens of the United States; and, by its board of directors, to appoint such officers and employees as may be deemed proper, define their authority and duties, require bonds of them, and fix the penalty thereof, dismiss such officers or employees, or any thereof, at pleasure and appoint others to fill their places; to prescribe, by its board of directors, by-laws not inconsistent with law or with the regulations of the Federal Reserve Board regulating the manner in which its stock shall be transferred, its directors elected or appointed, its officers and employees appointed, its property transferred, and the privileges granted to it by law exercised and enjoyed.

Each corporation so organized shall have power, under such rules and regulations as the Federal Reserve Board may prescribe:

(a) To purchase, sell, discount, and negotiate, with or

without its indorsement or guaranty, notes, drafts, checks, bills of exchange, acceptances, including bankers' acceptances, cable transfers, and other evidences of indebtedness; to purchase and sell, with or without its indorsement or guaranty, securities, including the obligations of the United States or of any State thereof but not including shares of stock in any corporation except as herein provided; to accept bills or drafts drawn upon it subject to such limitations and restrictions as the Federal Reserve Board may impose; to issue letters of credit; to purchase and sell coin, bullion, and exchange; to borrow and to lend money; to issue debentures, bonds, and promissory notes under such general conditions as to security and such limitations as the Federal Reserve Board may prescribe, but in no event having liabilities outstanding thereon at any one time exceeding ten times its capital stock and surplus; to receive deposits outside of the United States and to receive only such deposits within the United States as may be incidental to or for the purpose of carrying out transactions in foreign countries or dependencies or insular possessions of the United States; and generally to exercise such powers as are incidental to the powers conferred by this Act or as may be usual, in the determination of the Federal Reserve Board, in connection with the transaction of the business of banking or other financial operations in the countries, colonies, dependencies, or possessions in which it shall transact business and not inconsistent with the powers specifically granted herein. Nothing contained in this section shall be construed to prohibit the Federal Reserve Board, under its power to prescribe rules and regulations, from limiting the aggregate amount of liabilities of any or all classes incurred by the corporation and outstanding at any one time. Whenever a corporation organized under this section receives deposits in the United States authorized by this section it shall carry reserves in such amounts as the Federal Reserve Board may prescribe, but in no event less than 10 per centum of its deposits.

(b) To establish and maintain for the transaction of its business branches or agencies in foreign countries, their dependencies or colonies, and in the dependencies or insular possessions of the United States, at such places as may be

approved by the Federal Reserve Board and under such rules and regulations as it may prescribe, including countries or dependencies not specified in the original organization certificate.

(c) With the consent of the Federal Reserve Board to purchase and hold stock or other certificates of ownership in any other corporation organized under the provisions of this section, or under the laws of any foreign country or a colony or dependency thereof, or under the laws of any State, dependency, or insular possession of the United States but not engaged in the general business of buying or selling goods, wares, merchandise or commodities in the United States, and not transacting any business in the United States except such as in the judgment of the Federal Reserve Board may be incidental to its international or foreign business: *Provided, however, That*, except with the approval of the Federal Reserve Board, no corporation organized hereunder shall invest in any one corporation an amount in excess of 10 per centum of its own capital and surplus, except in a corporation engaged in the business of banking, when 15 per centum of its capital and surplus may be so invested: *Provided further, That* no corporation organized hereunder shall purchase, own, or hold stock or certificates of ownership in any other corporation organized hereunder or under the laws of any State which is in substantial competition therewith, or which holds stock or certificates of ownership in corporations which are in substantial competition with the purchasing corporation.

Nothing contained herein shall prevent corporations organized hereunder from purchasing and holding stock in any corporation where such purchase shall be necessary to prevent a loss upon a debt previously contracted in good faith; and stock so purchased or acquired in corporations organized under this section shall within six months from such purchase be sold or disposed of at public or private sale unless the time to so dispose of same is extended by the Federal Reserve Board.

No corporation organized under this section shall carry on any part of its business in the United States except such as, in the judgment of the Federal Reserve Board, shall be incidental to its international or foreign business: *And*

provided further, That except such as is incidental and preliminary to its organization no such corporation shall exercise any of the powers conferred by this section until it has been duly authorized by the Federal Reserve Board to commence business as a corporation organized under the provisions of this section.

No corporation organized under this section shall engage in commerce or trade in commodities except as specifically provided in this section, nor shall it either directly or indirectly control or fix or attempt to control or fix the price of any such commodities. The charter of any corporation violating this provision shall be subject to forfeiture in the manner hereinafter provided in this section. It shall be unlawful for any director, officer, agent, or employee of any such corporation to use or to conspire to use the credit, the funds, or the power of the corporation to fix or control the price of any such commodities, and any such person violating this provision shall be liable to a fine of not less than \$1000 and not exceeding \$5000 or imprisonment not less than one year and not exceeding five years, or both, in the discretion of the court.

No corporation shall be organized under the provisions of this section with a capital stock of less than \$2,000,000, one-quarter of which must be paid in before the corporation may be authorized to begin business, and the remainder of the capital stock of such corporation shall be paid in installments of at least 10 per centum on the whole amount to which the corporation shall be limited as frequently as one installment at the end of each succeeding two months from the time of the commencement of its business operations until the whole of the capital stock shall be paid in. The capital stock of any such corporation may be increased at any time, with the approval of the Federal Reserve Board, by a vote of two-thirds of its shareholders or by unanimous consent in writing of the shareholders without a meeting and without a formal vote, but any such increase of capital shall be fully paid in within ninety days after such approval; and may be reduced in like manner, provided that in no event shall it be less than \$2,000,000. No corporation, except as herein provided,

shall during the time it shall continue its operations withdraw or permit to be withdrawn, either in the form of dividends or otherwise, any portion of its capital. Any national banking association may invest in the stock of any corporation organized under the provisions of this section, but the aggregate amount of stock held in all corporations engaged in business of the kind described in this section and in Section 25 of the Federal Reserve Act as amended shall not exceed 10 per centum of the subscribing bank's capital and surplus.

A majority of the shares of the capital stock of any such corporation shall at all times be held and owned by citizens of the United States, by corporations the controlling interest in which is owned by citizens of the United States, chartered under the laws of the United States or of a State of the United States, or by firms or companies, the controlling interest in which is owned by citizens of the United States. The provisions of section 8 of the act approved October 15, 1914, entitled "An act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", as amended by the acts of May 15, 1916, and September 7, 1916, shall be construed to apply to the directors, other officers, agents, or employees of corporations organized under the provisions of this section: *Provided, however,* That nothing herein contained shall (1) prohibit any director or other officer, agent or employee of any member bank, who has procured the approval of the Federal Reserve Board from serving at the same time as a director or other officer, agent or employee of any corporation organized under the provisions of this section in whose capital stock such member bank shall have invested; or (2) prohibit any director or other officer, agent, or employee of any corporation organized under the provisions of this section, who has procured the approval of the Federal Reserve Board, from serving at the same time as a director or other officer, agent or employee of any other corporation in whose capital stock such first-mentioned corporation shall have invested under the provisions of this section.

No member of the Federal Reserve Board shall be an officer or director of any corporation organized under the

provisions of this section, or of any corporation engaged in similar business organized under the laws of any State, nor hold stock in any such corporation, and before entering upon his duties as a member of the Federal Reserve Board he shall certify under oath to the Secretary of the Treasury that he has complied with this requirement.

Shareholders in any corporation organized under the provisions of this section shall be liable for the amount of their unpaid stock subscriptions. No such corporation shall become a member of any Federal Reserve Bank.

Should any corporation organized hereunder violate or fail to comply with any of the provisions of this section, all of its rights, privileges, and franchises derived herefrom may thereby be forfeited. Before any such corporation shall be declared dissolved, or its rights, privileges, and franchises forfeited, any noncompliance with, or violation of such laws shall, however, be determined and adjudged by a court of the United States of competent jurisdiction, in a suit brought for that purpose in the district or territory in which the home office of such corporation is located, which suit shall be brought by the United States at the instance of the Federal Reserve Board or the Attorney-General. Upon adjudication of such noncompliance or violation, each director and officer who participated in, or assented to, the illegal act or acts, shall be liable in his personal or individual capacity for all damages which the said corporation shall have sustained in consequence thereof. No dissolution shall take away or impair any remedy against the corporation, its stockholders, or officers for any liability or penalty previously incurred.

Any such corporation may go into voluntary liquidation and be closed by a vote of its shareholders owning two-thirds of its stock.

Whenever the Federal Reserve Board shall become satisfied of the insolvency of any such corporation, it may appoint a receiver who shall take possession of all of the property and assets of the corporation and exercise the same rights, privileges, powers, and authority with respect thereto as are now exercised by receivers of national banks appointed by the Comptroller of the Currency of the United States: *Provided, however,* That the assets of the cor-

poration subject to the laws of other countries or jurisdictions shall be dealt with in accordance with the terms of such laws.

Every corporation organized under the provisions of this section shall hold a meeting of its stockholders annually upon a date fixed in its by-laws, such meeting to be held at its home office in the United States. Every such corporation shall keep at its home office books containing the names of all stockholders thereof, and the names and addresses of the members of its board of directors, together with copies of all reports made by it to the Federal Reserve Board. Every such corporation shall make reports to the Federal Reserve Board at such times and in such form as it may require; and shall be subject to examination once a year and at such other times as may be deemed necessary by the Federal Reserve Board by examiners appointed by the Federal Reserve Board, the cost of such examinations, including the compensation of the examiners, to be fixed by the Federal Reserve Board and to be paid by the corporation examined.

The directors of any corporation organized under the provisions of this section may, semiannually, declare a dividend of so much of the net profits of the corporation as they shall judge expedient; but each corporation shall, before the declaration of a dividend, carry one-tenth of its net profits of the preceding half year to its surplus fund until the same shall amount to 20 per centum of its capital stock.

Any corporation organized under the provisions of this section shall be subject to tax by the State within which its home office is located in the same manner and to the same extent as other corporations organized under the laws of that State which are transacting a similar character of business. The shares of stock in such corporation shall also be subject to tax as the personal property of the owner or holders thereof in the same manner and to the same extent as the shares of stock in similar State corporations.

Any corporation organized under the provisions of this section may at any time within the two years next previous to the date of the expiration of its corporate existence, by a vote of the shareholders owning two-thirds of its stock,

apply to the Federal Reserve Board for its approval to extend the period of its corporate existence for a term of not more than twenty years, and upon certified approval of the Federal Reserve Board such corporation shall have its corporate existence for such extended period unless sooner dissolved by the act of the shareholders owning two-thirds of its stock, or by an Act of Congress or unless its franchise becomes forfeited by some violation of law.

Any bank or banking institution, principally engaged in foreign business, incorporated by special law of any State or of the United States or organized under the general laws of any State or of the United States and having an unimpaired capital sufficient to entitle it to become a corporation under the provisions of this section may, by the vote of the shareholders owning not less than two-thirds of the capital stock of such bank or banking association, with the approval of the Federal Reserve Board, be converted into a Federal corporation of the kind authorized by this section with any name approved by the Federal Reserve Board: *Provided, however,* That said conversion shall not be in contravention of the State law. In such case the articles of association and organization certificate may be executed by a majority of the directors of the bank or banking institution, and the certificate shall declare that the owners of at least two-thirds of the capital stock have authorized the directors to make such certificate and to change or convert the bank or banking institution into a Federal corporation. A majority of the directors, after executing the articles of association and the organization certificate, shall have power to execute all other papers and to do whatever may be required to make its organization perfect and complete as a Federal corporation. The shares of any such corporation may continue to be for the same amount each as they were before the conversion, and the directors may continue to be directors of the corporation until others are elected or appointed in accordance with the provisions of this section. When the Federal Reserve Board has given to such corporation a certificate that the provisions of this section have been complied with, such corporation and all its stockholders, officers, and employees, shall have the same powers and privileges, and shall be sub-

ject to the same duties, liabilities, and regulations, in all respects, as shall have been prescribed by this section for corporations originally organized hereunder.

Every officer, director, clerk, employee, or agent of any corporation organized under this section who embezzles, abstracts, or willfully misapplies any of the moneys, funds, credits, securities, evidences of indebtedness or assets of any character of such corporation; or who, without authority from the directors, issues or puts forth any certificate of deposit, draws any order or bill of exchange, makes any acceptance, assigns any note, bond, debenture, draft, bill of exchange, mortgage, judgment, or decree; or who makes any false entry in any book, report, or statement of such corporation with intent, in either case, to injure or defraud such corporation or any other company, body politic or corporate, or any individual person, or to deceive any officer of such corporation, the Federal Reserve Board, or any agent or examiner appointed to examine the affairs of any such corporation; and every receiver of any such corporation and every clerk or employee of such receiver who shall embezzle, abstract, or willfully misapply or wrongfully convert to his own use any moneys, funds, credits, or assets of any character which may come into his possession or under his control in the execution of his trust or the performance of the duties of his employment; and every such receiver or clerk or employee of such receiver who shall, with intent to injure or defraud any person, body politic or corporate, or to deceive or mislead the Federal Reserve Board, or any agent or examiner appointed to examine the affairs of such receiver, shall make any false entry in any book, report, or record of any matter connected with the duties of such receiver; and every person who with like intent aids or abets any officer, director, clerk, employee, or agent of any corporation organized under this section, or receiver or clerk or employee of such receiver as aforesaid in any violation of this section, shall upon conviction thereof be imprisoned for not less than two years nor more than ten years, and may also be fined not more than \$5000, in the discretion of the court.

Whoever being connected in any capacity with any corporation organized under this section represents in any

way that the United States is liable for the payment of any bond or other obligation, or the interest thereon, issued or incurred by any corporation organized hereunder, or that the United States incurs any liability in respect of any act or omission of the corporation, shall be punished by a fine of not more than \$10,000 and by imprisonment for not more than five years.

§ 1133. Exclusive Jurisdiction.

Offenses under the National Banking Acts are exclusively cognizable by the courts of the United States.¹ But it has been held that it is competent for a State legislature to pass any law affecting the business of a State bank, or protect the bank or its customers in the conduct of that business by any penalty, without interference by the laws of Congress.² A State act making it a felony for any officer of a bank to receive deposits with knowledge that the bank is insolvent applies to officers of national as well as other banks; such an act does not incapacitate the bank from any duty to the government and is not an attempt to control and regulate the business operations of a national bank.³ Under this section the crime of embezzlement by a cashier of a national bank is taken out of the jurisdiction of a State court under whose laws such a crime would be a felony. A defaulting cashier of a national bank, however flagrant his embezzlement may be, so far from being a principal felon, is not in legal strictness a felon at all;⁴ therefore, an accessory to such an embezzlement by an officer of a national bank cannot be indicted for a felony under the State statute.⁵ Embezzlement by a national bank cashier is punishable solely under this section.⁶ But a fraudulent conversion by a national bank officer of bank deposits, not being punishable by any existing law of the United States, is within the jurisdiction of the State courts under a State statute.⁷ By

§ 1133. ¹ *In re Eno*, 54 Fed. 669 (making false entries); *United States v. Buskey*, 38 Fed. 99 (embezzlement); *United States v. Graves*, 53 Fed. 634, 638 (false entries).

² *State v. Tuller*, 34 Conn. 280, 297.

³ *State v. Fields*, 98 Iowa, 748, 62 S. W. 653; *State v. Bardwell*, 72 Miss. 535, 18 So. 377.

⁴ *Commonwealth v. Felto*, 101 Mass. 204.

⁵ *Ibid.*

⁶ *Commonwealth v. Ketner*, 92 Pa. 372, followed in *Allen's Appeal*, 119 Pa. 192, 13 Atl. 70.

⁷ *Commonwealth v. Tenney*, 97 Mass. 50.

the national bank acts of 1863 and 1864 provision was made for the punishment of counterfeiting their bills and passing the counterfeits, but there was no reservation to the State, therefore a State court has no jurisdiction over the offense.⁸ Making false entries in the books of a national bank is not a crime of which the State courts have concurrent jurisdiction, the offense being created by the laws of Congress.⁹ A State is without lawful power to make special laws, declaring certain acts to be criminal offenses when committed by bank officers or agents, applicable to banks organized and operating under the laws of the United States.¹⁰ The statute does not purport to punish larceny as such, and does not relieve a bank officer from liability to punishment for a larceny at common law or under State statutes, although the same evidence might sustain a charge of embezzlement under the Federal statute.¹¹ In an indictment for forgery by a national bank clerk the jurisdiction of the State court was sustained, the offense not being held the same as that under the Federal statute. The Court said: "The objects of the United States law and the State law appear to be different. The purpose of the former seems to be for the protection of national banks, to punish breaches of trust on the part of those holding fiduciary relations toward such banks, to punish what is of the nature of a private crime. The State law is for the protection of the public against the public mischief to the people of the State from the perpetration of forgeries. The United States statute is not leveled against the crime of forgery, but against a breach of trust. . . ." ¹²

§ 1134. Strict Construction Required.

The statutes relating to National Banks are highly penal, and should therefore receive a strict construction,¹ because Section 5209 imposes for the slightest offense and a very inconsequential act a minimum penalty of five years' imprisonment.²

⁸ *Ex parte Houghton*, 8 Fed. 897.

517, 13 N. E. 823; *Commonwealth*

⁹ *In re Eno*, 54 Fed. 669.

v. Luberg, 94 Pa. 85; *State v. Cross*,

¹⁰ *Easton v. Iowa*, 188 U. S. 220,
47 L. ed. 452, 23 S. C. 228.

101 N. Car. 770, 7 S. E. 715.

¹¹ *Commonwealth v. Barry*, 116
Mass. 1.

§ 1134. ¹ *United States v. Ege*,
49 Fed. 852.

¹² *Hoke v. People*, 122 Ill. 511,

² *United States v. Potter*, 56 Fed.
83, 102, *reversed* on other grounds, 155

§ 1135. Number of Offenses.

The statute creates and defines several distinct offenses, the evidence necessary to establish each being entirely different.¹ The first clause of Section 5209 of the Revised Statute provides for three distinct and separate offenses: the crime of embezzlement, of abstraction, and of willful misapplication of the moneys, funds, or credits of the bank.² Embezzlement, abstraction, and misapplication are each separate and distinct acts, which, when committed with either the intent to injure or defraud or with the intent to deceive, mentioned in the statute, become separate and distinct offenses under its terms.³

§ 1136. Offenses Felonies though Designated Misdemeanors.

Long prior to the enactment of the Federal Penal Code of 1910 the Supreme Court had held, in substance, that, while the offense is in the statute designated a misdemeanor, it is in fact an infamous crime. In *United States v. De Walt*¹ it was held that the offense denounced in Section 5209 is an infamous crime, for which the defendant could not be held on information, but only on presentment or indictment. In *re Chasen*² is to the same effect. The court there said of the crime denounced in Section 5209: "In determining whether the crime is infamous, the question is whether it is one for which the statute authorizes the court to award an infamous punishment." In *Folsom v. United States*,³ the court said: "The offense denounced by section 5209 of the Revised Statutes is punishable by imprisonment of not less than five and not more than ten years, and is therefore an infamous crime." Section 335 of the Penal Code has no effect upon Section 5209 except to define as a felony the offense therein described.⁴ To the same effect is *United States v. Cadwallader*.⁵

U. S. 438, 39 L. ed. 214, 15 S. C. 144;
United States v. Herrig, 204 Fed. 124.

§ 1135. ¹ *United States v. Cadwallader*, 59 Fed. 677; *United States v. Norton*, 188 Fed. 256.

² *United States v. Lee*, 12 Fed. 816.

³ *United States v. Norton*, 188 Fed. 256. See also INTENT.

§ 1136. ¹ 128 U. S. 393, 32 L. ed. 485, 9 S. C. 111.

² 140 U. S. 200, 35 L. ed. 409, 11 S. C. 735.

³ 160 U. S. 121, 40 L. ed. 363, 16 S. C. 222.

⁴ *Sheridan v. United States*, 236 Fed. 305, 309, 149 C. C. A. 437 (9th Cir.).

⁵ *United States v. Cadwallader*, 59 Fed. 677.

The punishment imposed for violating this section, being at least five years in the penitentiary, constitutes those offenses felonies.⁶

§ 1137. Agent in Liquidation of Bank.

The president of a national bank, appointed by the shareholders to close its affairs in liquidation, with authority to collect its credits, is an "agent" within the section, which includes an agent in liquidation as well as an agent for ordinary business.¹

§ 1138. President and Agent.

The description of a defendant as "president and agent" is not contradictory. There is no repugnance in the two characters. Even on the supposition that the statute means to make a distinction between the two offices of president and agent, there is nothing in the nature of either to prevent them both being held at the same time by one person, and the acts charged may in contemplation of law have been committed by him in both capacities.¹

§ 1139. In Course of Duties.

A defendant will not be responsible under this section for acts not done as an officer of the bank.¹

§ 1140. Assistant Cashier.

As the language of the section applies not only to the president and cashier, but to any director, teller, or agent of a national bank, an assistant cashier falls within the category of clerk or agent.¹

§ 1141. Indictment.

The words "national banking association" in an indictment are sufficient without adding "organized under the laws of the United States."¹ It is not necessary to allege that the bank was

⁶ *Hoss v. United States*, 232 Fed. 328, 146 C. C. A. 376 (8th Cir.).

§ 1137. ¹ *Jewitt v. United States*, 100 Fed. 832, 41 C. C. A. 88 (1st Cir.), *affirming* 84 Fed. 142.

§ 1138. ¹ *United States v. Northway*, 120 U. S. 327, 30 L. ed. 664, 7 S. C. 580.

§ 1139. ¹ *United States v. Ege*,

49 Fed. 852. *See also* *United States v. Potter*, 56 Fed. 97.

§ 1140. ¹ *Cochran & Sayre v. United States*, 157 U. S. 286, 39 L. ed. 704, 15 S. C. 628.

§ 1141. ¹ *Geiger v. United States*, 162 Fed. 844, 89 C. C. A. 516 (4th Cir.), and see notes under §§ 1171, 1175, *infra*.

doing business at the time of the alleged offense.² In an indictment charging an officer with willful misapplication, it is not necessary to aver that the acts set out were done without authority from the directors.³

§ 1142. Indictment — Duplicity and Misdescription.

An indictment under this section is bad, both for duplicity and insufficient description of the offenses, which charges embezzlement as well as misapplication of the "funds and credits" of a national bank by the defendant as president, without setting forth any particular description of either, and without any separate statement as to the amount, either of "funds" or of "credits" so embezzled or misapplied.¹ It is admissible and proper to join in a single count a charge of willful misapplication by its officers and a charge that other defendants named aided and abetted them therein.² An indictment charging that the defendant, without authority and with intent to injure or defraud the bank of which he was cashier, did issue and put forth a certain certificate of deposit, was held not duplicitous.³

§ 1143. Evidence.

Evidence of the actual existence of a national bank, and of acts done by the accused as president thereof, is sufficient evidence of the legal incorporation of the bank, and of the connection of the accused with it.¹

§ 1144. "Moneys."

"Moneys" in this section includes all money, whether gold, silver, legal tender notes, or national currency notes, and is not confined to "lawful money" only, as ordinarily used;¹ but relates to the currency or circulating medium of the country.²

² *Geiger v. United States*, *supra*; *Jewett v. United States*, 100 Fed. 532, 41 C. C. A. 88 (1st Cir.).

³ *Flickinger v. United States*, 150 Fed. 1, 79 C. C. A. 515 (6th Cir.).

§ 1142. ¹ *United States v. Smith*, 152 Fed. 542.

² *Prettyman v. United States*, 180 Fed. 30, 35, 103 C. C. A. 384 (6th Cir.).

³ *Simpson v. United States*, 229 Fed. 940, 144 C. C. A. 222 (9th Cir.).

§ 1143. ¹ *In re Van Campen*, 2 Ben. 419, 28 Fed. Cas. No. 16835.

§ 1144. ¹ *United States v. Johnson*, 4 Cin. Law Bul. 361, 26 Fed. Cas. No. 15483.

² *United States v. Smith*, 152 Fed. 542.

§ 1145. "Funds."

"Funds" refers to government, State, county, municipal, or other bonds, and to other forms of obligations and securities in which investments may be made.¹

§ 1146. "Credits."

"Credits" refers to notes and bills payable to the bank, and to other forms of direct promises to pay money to it.¹

§ 1147. Intent.

The intent to deceive, or to injure and defraud, is an essential ingredient of every offense specified in the section.¹ For a promoter of various enterprises to obtain the funds of a bank on the security of unmarketable bonds of his own enterprises at the risk of the interests of the bank is not proper and legitimate banking, and the entries on the books of the bank as loans and investments do not conceal the fraud thus perpetrated upon the bank.² And a reckless act, moreover, is always regarded as the equivalent of a willful one.³

§ 1148. Intent under Amended Statute.

As in the original statute, the intent is an essential part of the offense under the amendments. Under the statute as amended

§ 1145. ¹ *United States v. Smith*, 152 Fed. 542.

§ 1146. ¹ *United States v. Smith*, 152 Fed. 542.

§ 1147. ¹ See also notes under § 1148, *infra*; *United States v. Britton*, 107 U. S. 655, 669, 27 L. ed. 520, 2 S. C. 512; *United States v. Voorhees*, 9 Fed. 143; *McKnight v. United States*, 111 Fed. 735, 49 C. C. A. 594 (6th Cir.); *United States v. Norton*, 188 Fed. 256; *Richardson v. United States*, 181 Fed. 1, 104 C. C. A. 69 (3d Cir.); *United States v. Wilson*, 176 Fed. 806; *Walsh v. United States*, 174 Fed. 615, 98 C. C. A. 461 (7th Cir.); *United States v. Steinman*, 172 Fed. 913, 97 C. C. A. 271 (3d Cir.); *Cummins v. United States*, 232 Fed.

844, 147 C. C. A. 38 (8th Cir.); *Evans v. United States*, 153 U. S. 584, 594, 38 L. ed. 830, 14 S. C. 934; *Prettyman v. United States*, 180 Fed. 30, 103 C. C. A. 384 (6th Cir.); *United States v. Graves*, 53 Fed. 634, 644; *Galbreath v. United States*, 257 Fed. 648, — C. C. A. — (6th Cir.).

² *Walsh v. United States*, 174 Fed. 615, 618, 98 C. C. A. 461, 464 (7th Cir.), *Showalter v. United States*, 260 Fed. 719, — C. C. A. — (4th Cir.). *Certiorari denied* 250 U. S. 672, 64 L. ed. 53, 40 S. C. 14.

³ *Lear v. United States*, 147 Fed. 349, 359, 77 C. C. A. 527 (3d Cir.), *approved in Showalter v. United States, supra*.

the offense charged must be "with intent in any case to injure and defraud such Federal Reserve Bank, or member bank, or any other company, body politic or corporate, or any individual person, or to deceive any officer of such Federal Reserve Bank, or member bank, or the Comptroller of the Currency, or any agent or examiner appointed to examine the affairs of such Federal Reserve Bank, or member bank, or Federal Reserve Board", and an indictment which does not charge intent is defective.¹

§ 1149. Honest Mistakes.

The honest exercise of official discretion in good faith, without fraud, for the advantage, or supposed advantage, of the association, is not punishable; ¹ but if official action is taken, not in the honest exercise of discretion, in bad faith, for personal advantage, and with fraudulent intent, it is punishable.²

§ 1150. Intent at Time Governs.

The question of intent is to be determined by the facts at the time of the transaction; and the defendant is not protected by intent to finally correct the temporary wrong deed.¹

§ 1151. Presumption of Intent.

Intent may be presumed from the doing of the wrongful, fraudulent or illegal act.¹ This presumption may, of course, be rebutted.² Upon the question of the intent required under

§ 1148. ¹ *United States v. Jenks*, 258 Fed. 763.

§ 1149. ¹ *United States v. Fish*, 24 Fed. 585; *United States v. Britton*, 108 U. S. 192, 27 L. ed. 703, 2 S. C. 525.

² *United States v. Fish*, *supra*; *United States v. Youtsey*, 91 Fed. 864; *United States v. Breese*, 131 Fed. 915.

§ 1150. ¹ *Agnew v. United States*, 165 U. S. 36, 57, 41 L. ed. 624, 17 S. C. 235.

§ 1151. ¹ *Agnew v. United States*, 165 U. S. 36, 49, 57, 41 L. ed. 624, 17 S. C. 235; *Allis v. United States*, 155 U. S. 117, 39 L. ed. 91, 15 S. C.

36; *United States v. Youtsey*, 91 Fed. 864; *United States v. Breese*, 131 Fed. 915; *United States v. Allis*, 73 Fed. 165; *Peters v. United States*, 94 Fed. 127, 36 C. C. A. 105 (— Cir.); *United States v. Taintor*, 11 Blatchf. (U. S.) 374, 28 Fed. Cas. No. 16428; *In re Van Campen*, 2 Ben. 419, 28 Fed. Cas. No. 16835; *Cummins v. United States*, 232 Fed. 844, 147 C. C. A. 38 (8th Cir.); *United States v. Graves*, 53 Fed. 634, 657.

² *Agnew v. United States*, 165 U. S. 36, 49, —, 41 L. ed. 624, 17 S. C. 235; *United States v. Youtsey*, *supra*.

this section, the inferences to be drawn from the evidence are peculiarly within the province of the jury.³

§ 1152. Nature of Intent.

Proof of malice or ill will towards the bank is not essential.¹ It is sufficient that the unlawful intent, if carried out, would naturally or necessarily injure or defraud the bank.² The intent to injure or defraud contemplated by the statute is not inconsistent with a deep and abiding interest on the part of the accused in the prosperity of the bank, and a sincere desire for its ultimate success and welfare. If a man knows that the act he is about to commit will naturally or necessarily have the effect of injuring or defrauding another, and he voluntarily and intentionally does the act, he is chargeable, in law, with the intent to injure or defraud. It is not necessary that his object or purpose was primarily to injure or defraud. It may have been to benefit himself.³

§ 1153. Different Intent.

Criminal intent differs as to false entry counts and misapplication counts. As to the former, the intent required to be proved is that the false entries were made with intent to deceive any officer of the association, or any agent appointed to examine its affairs, while, as to the misapplication counts, the intent, to be criminal, must have been to injure or defraud the bank.¹

§ 1154. Other Acts to Show Intent.

Evidence of similar unlawful acts other than those charged, occurring about the same time, is admissible to show intent.¹ They must be similar acts and done about the same time.² Two

¹ Cummins v. United States, *supra*.

§ 1152. ¹ United States v. Kenney, 90 Fed. 257; United States v. Breese, 131 Fed. 915, 922.

² United States v. Kenney, *supra*; United States v. Breese, *supra*.

³ United States v. Breese, *supra*.

§ 1153. ¹ Galbreath v. United States, 257 Fed. 648, — C. C. A. — (6th Cir.).

§ 1154. ¹ Bacon v. United States,

97 Fed. 35, 38 C. C. A. 37 (8th Cir.); Allis v. United States, 155 U. S. 117, —, 39 L. ed. 91, 5 S. C. 36; Dorsey v. United States, 101 Fed. 746, 41 C. C. A. 652 (8th Cir.); Breese v. United States, 106 Fed. 680, 45 C. C. A. 535 (4th Cir.); Walsh v. United States, 174 Fed. 615, 98 C. C. A. 461 (7th Cir.).

² Prettyman v. United States, 180 Fed. 30, 103 C. C. A. 384 (6th Cir.).

or three years was held not too remote.³ Evidence is admissible to show absence of criminal intent.⁴

§ 1155. Evidence of Intent.

Under an indictment for misapplication, against officers of a bank and a depositor, where the question of intent is involved, the relations of the parties may be shown, the mode in which the business was carried on, and the knowledge which the officers had of the character of the operations carried on by the depositor.¹

§ 1156. Intent for Jury.

Where the transactions, as shown by the books of the bank, were legitimate and proper on their face, the question of intent is for the jury under proper instructions.¹

§ 1157. Embezzlement.

Embezzlement within the meaning of the section is unlawful conversion by an officer of the bank to his own use of funds intrusted to him, with intent to injure or defraud the bank.¹ Embezzlement within this section "involves two general ingredients or elements: First, a breach of trust or duty in respect to the moneys, properties and effects in the party's possession, belonging to another; and, secondly, the wrongful appropriation thereof to his own use. In order to constitute this crime, it is necessary that the property, money, or effects embezzled should have previously come lawfully into the hands, possession, or custody of the party charged with such offense, and that while so in his possession and custody, held for the use and benefit of the real owner, he wrongfully converted the same to his own use."²

³ Galbreath v. United States, 257 Fed. 648, — C. C. A. — (6th Cir.).

⁴ United States v. Steinman, 172 Fed. 913, 97 C. C. A. 271 (3d Cir.); Prettyman v. United States, *supra*.

§ 1155. ¹ Dow v. United States, 82 Fed. 904, 27 C. C. A. 140 (8th Cir.).

§ 1156. ¹ Walsh v. United States,

174 Fed. 615, 98 C. C. A. 461 (7th Cir.).

§ 1157. ¹ United States v. Youtsey, 91 Fed. 864; Moore v. United States, 160 U. S. 268, 40 L. ed. 422, 16 S. C. 294.

² United States v. Harper, 33 Fed. 474, 476, *quoted in* United States v. Breese, 131 Fed. 915.

§ 1158. Duties.

An accused's duty was to take drafts or other items received by the bank from its patrons for collection, present them in person to the drawees or others liable on them, receive the money due on them, and return it to the bank. His method of doing it was to report to his superiors in the bank a less amount collected than he actually received, and convert the difference to his own use. He necessarily had made the collection and had taken the money into his own possession before the act of conversion took place. In making the collection he was clearly acting as agent for the bank, and his duty as such agent was to report and deliver the full amount collected to his principal. As between him and the bank the money undoubtedly belonged to the latter, and any appropriation of it was the appropriation of the money of the bank.¹

§ 1159. Abstraction.

Abstraction, under this section, is the act of one who, being an officer of a national banking association, wrongfully takes or withdraws from it any of its money, funds, or credits, with intent to injure or defraud it, or some other person or company, and, without its knowledge and consent, or that of its board of directors, converts them to the use of himself, or of some person or company other than the bank. No previous lawful possession is necessary to constitute the crime, nor does it matter in what manner it is accomplished. It may be done by one act, or by a succession of acts. It may be done under color of loans, discounts, checks and the like. The means used do not change the nature of the act. If the necessary or natural result is to wrongfully withdraw funds or moneys of the bank, without its actual knowledge and consent, by its board of directors, and to convert the same to the use and benefit of the abstractor, or to that of some person or company other than the bank, the means resorted to are of no consequence, and in no way affect its criminal nature.¹

§ 1158. ¹ *Spencer v. United States*, 169 Fed. 562, 95 C. C. A. 60 (8th Cir.).

§ 1159. ¹ *United States v. Breese*, 131 Fed. 915, reversed on other grounds, 143 Fed. 250.

§ 1160. Abstraction — Definition and Elements of Offense.

It is true that the word “abstract,” as used in this section, is not a word of settled technical meaning like the word “embezzle,” as used in statutes defining the offense of embezzlement, and the words “steal, take and carry away”, as used to define the offense of larceny at common law. It is a word, however, of simple, popular meaning, without ambiguity. It means to take or withdraw from, so that to abstract the funds of the bank, or a portion of them, is to take and withdraw from the possession and control of the bank the moneys and funds alleged to be so abstracted. This, of course, does not embrace every element of that which under this section is made the offense of criminally abstracting the funds of the bank. To constitute that offense, within the meaning of the act, it is necessary that the moneys and funds should be abstracted from the bank without its knowledge and consent, with the intent to injure or defraud it or some other company or person, or to deceive some officer of the association, or an agent appointed to examine its affairs.¹ Unlike the word “misapply,” as used in this section, the word “abstract” is not ambiguous, because it does not appear from other parts of the statute that there are two or more kinds of abstracting, both unlawful, but only one described as a criminal offense. The word “abstract,” as used in the statute, therefore, has but one meaning, being that which is attached to it in its ordinary and popular use.¹

§ 1161. Difference from Larceny.

The offense of “abstracting” the funds of a bank under this section is not necessarily equivalent to the offense of larceny. The offense of larceny is not complete without the *animus furandi*, the intent to deprive the owner of his property, but under this section an officer of the bank may be guilty of “abstracting” the funds and money and credits of the bank without that particular intent. The statute may be satisfied with an intent to injure or defraud some other company, body politic or corporate, or individual person, than the banking association whose property is abstracted,

§ 1160. ¹ United States v. North- 664, 7 S. C. 580; United States v. way, 120 U. S. 327, 334, 30 L. ed. Harper, 33 Fed. 474, 479.

or merely to deceive some other officer of the association, or an agent appointed to examine its affairs.¹

§ 1162. Difference from Embezzlement.

No previous lawful possession, as in the crime of embezzlement, is necessary in order to commit this offense; nor is it material by what means, contrivances, or devices the abstraction of its funds from the possession of the bank is effected and accomplished. It may be done by one act or a succession of acts, or it may be effected by fraudulent schemes and contrivances, under the color of loans, discounts, checks, or entries. The methods of its accomplishment do not change the character of the act. If the ultimate result is to wrongfully obtain funds or money of the bank, without its knowledge or consent, and convert the same to the wrongdoer's use and benefit, the instrumentalities resorted to or employed to effect that end in no way change the criminal character of the act.¹

§ 1163. Indictment — Abstraction of Deposit.

An indictment charging the abstraction of a general deposit to the credit of a depositor made "for his sole use and benefit" was held sufficient against the contention that the deposit was a special deposit.¹

§ 1164. Abstraction and Embezzlement.

Whenever the crime of embezzlement, under this section, is committed, it embraces as well the offenses of abstraction and willful misapplication, but the converse of the proposition is not necessarily true.¹ Where the president of a national bank, charged, as trustee, with the administration of the funds of the bank in his hands, converts them to his own use, he embezzles and abstracts them, within this section, unless he shows authority for doing so.²

§ 1161. ¹ *United States v. Northway*, 120 U. S. 327, 335, 30 L. ed. 664, 7 S. C. 580.

§ 1162. ¹ *United States v. Harper*, 33 Fed. 474, 480.

§ 1163. ¹ *Sheridan v. United*

States, 236 Fed. 305, 149 C. C. A. 437 (9th Cir.).

§ 1164. ¹ *United States v. Breese*, 131 Fed. 915, 922.

² *In re Van Campen*, 2 Ben. 419, 28 Fed. Cas. No. 16835.

§ 1165. Abstraction and Misapplication.

Abstraction and misapplication within the meaning of this section are a conversion to his own use, by an officer of the bank, of funds of the bank which are not especially intrusted to his care.¹

§ 1166. Overdrafts.

An overdraft may be legal, or criminal, according to the intent of the person permitting it, as inferable from the surrounding circumstances shown in proof.¹ The mere fact of payment by the officers of a national bank of a check which creates an overdraft is not necessarily a fraudulent misapplication of the bank's funds.² The fact alone that an officer causes the bank to pay overdrafts, drawn by himself or customers of the bank, or makes a loan without security, does not constitute an offense within the section.³ The facts alleged must show that it is probable that the bank will be defrauded by the transaction.⁴

§ 1167. Issuing Certificates of Deposit.

The subsequent ratification by the directors of the issuance of certificates of deposit by a cashier of a national bank without authority from the directors and with intent to injure and defraud the bank does not change the character of the acts.¹

§ 1168. Bills of Exchange.

A cashier's check, drawn by the cashier of a bank, payable to the order of a named person, is a bill of exchange within the section.¹

§ 1169. Willful Misapplication. — Definition and Nature of Offense.

"Willful misapplication," within this section, means a misapplication, willfully and unlawfully made by one of the officers

§ 1165. ¹ *United States v. Youtsey*, 91 Fed. 864.

§ 1166. ¹ *United States v. Heinze*, 161 Fed. 425.

² *Dow v. United States*, 82 Fed. 904, 27 C. C. A. 140 (8th Cir.).

³ *United States v. Norton*, 188 Fed. 256.

⁴ *Ibid.*

§ 1167. ¹ *Simpson v. United States*, 229 Fed. 940, 144 C. C. A. 222 (9th Cir.).

§ 1168. ¹ *Hoss v. United States*, 232 Fed. 328, 146 C. C. A. 376 (8th Cir.).

enumerated therein, of the moneys, funds, or credits of the bank, and made with the intent to injure the bank, or some other company or person; and it has been held that there must be a conversion of the funds misapplied, to the use and benefit of the wrongdoer, or to the use of some one other than the bank. It is not necessary that the officer so charged should have been previously in the possession or custody of the money, funds or credits of the bank by virtue of any trust, duty, or employment.¹ To complete a misapplication of the funds of a bank, it is necessary that some portion thereof should be withdrawn from the possession or control of the bank, or a conversion in some form should be made thereof, so that the bank would be deprived of the benefit thereof; but it is not necessary in all cases that the money should be actually withdrawn from the bank.² Where fictitious checks have been paid in to the bank, some sum must be paid by the bank to the customer, or to third persons on his order, or must be credited to third parties under such circumstances that the bank becomes bound for the payment thereof.³ Willful misapplication under this section is entirely different from official maladministration, subjecting the bank to a forfeiture of its charter, as provided by Section 5239.⁴ Gross maladministration and inexcusable breach of duty on the part of its officers in the management of a national bank, however disastrous such conduct may be to its stockholders, are not punishable unless they come within the provisions of this section.⁵ An unintentional overdraft by a depositor in good standing, with ample means to pay, or an overdraft to be paid according to a prior agreement resting on abundant credit, does not constitute a willful misapplication within the section.⁶ To constitute willful misapplication of the funds, there must be in fact an application of those funds by the person charged, the application must be an unlawful one, and must have been made by the accused with the intent to injure and defraud

§ 1169. ¹ *United States v. Breese*, 131 Fed. 915, *reversed* on other grounds 143 Fed. 250.

² *Dow v. United States*, 82 Fed. 904, 27 C. C. A. 140 (8th Cir.); *United States v. Martindale*, 146 Fed. 280.

³ *Dow v. United States*, *supra*; *United States v. Martindale*, *supra*.

⁴ *United States v. Steinman*, 172 Fed. 913, 97 C. C. A. 271 (3d Cir.).

⁵ *Prettyman v. United States*, 180 Fed. 30, 34, 103 C. C. A. 384 (6th Cir.).

⁶ *United States v. Steinman*, *supra*.

the bank.⁷ Evidence of the taking of a mortgage to secure an indebtedness represented by overdrafts and the making of an additional loan secured by deposit of other collateral, the effect of which was to give the bank better security than before, is insufficient to constitute misapplication of funds.⁸ It is immaterial whether or not the party misapplying the property received any of the funds, or other advantage, directly or indirectly.⁹ If funds are abstracted or willfully misapplied, the defendant is precluded from denying that it was done with unlawful intent.¹⁰ To constitute the offense of willful misapplication of funds, it is not essential that the money should be actually withdrawn from the bank; the offense may be consummated by giving fraudulent credits, and the transfer thereof by means of checks.¹¹ Willful misapplication of funds is not changed, in its criminal character, by the fact that the act subsequently became known to the officers of the banks, and that they impliedly consented thereto, by taking no action in regard to it.¹²

§ 1170. Willful Misapplication — Examples.

The discounting by the president of a national bank of commercial paper, known by him to be worthless or fictitious, with the bank's funds for the benefit of an insolvent corporation of which he is an officer, with intent to injure and defraud the bank, is a willful misapplication.¹ The obtaining by an officer of a national bank, who is also a promoter of various enterprises, of the funds of the bank on the security of unmarketable bonds of his own enterprises, at the risk of the bank's interest, is a misapplication.² The paying of money out of the funds of a national bank to a designated person who is not entitled to the money, which is lost to the bank by such person's insolvency, is a misapplication.³

⁷ *Prettyman v. United States*, 180 Fed. 30, 39, 103 C. C. A. 384 (6th Cir.).

⁸ *Prettyman v. United States*, *supra*.

⁹ *United States v. Lee*, 12 Fed. 816.

¹⁰ *Ibid*.

¹¹ *Rieger v. United States*, 107 Fed. 916, 47 C. C. A. 61 (8th Cir.), *Certiorari denied* 181 U. S. 617, 45 L. ed. 1030, 21 S. C. 923.

¹² *Rieger v. United States*, *supra*.
See also *Breese v. United States*, 106 Fed. 680, 45 C. C. A. 535 (4th Cir.).

§ 1170. ¹ *Flickinger v. United States*, 150 Fed. 1, 79 C. C. A. 515 (6th Cir.).

² *Walsh v. United States*, 174 Fed. 615, 98 C. C. A. 461 (7th Cir.).

³ *Coffin v. United States*, 156 U. S. 432, 39 L. ed. 481, 15 S. C. 394.

It was held not to be willful misapplication for a president of a national bank to procure the discount by the bank of a note which is not well secured, and of which both maker and indorser are, to the president's knowledge, insolvent when the note is discounted, and to apply the proceeds of the discount to his own use.⁴ The permitting by a president of a national bank of the withdrawal by a depositor, who was largely indebted to the bank, of his deposits, without first paying his indebtedness to the bank, is not a violation of the section.⁵ The mere change of the form of an existing indebtedness from an account to a note is not a violation of the statute, and where the evidence shows that the bank was not injured, but benefited, by the taking of the note and collateral for an overdraft, there is no misapplication.⁶ If money of a bank is misapplied by paying it out on worthless paper, the subsequent renewal of such paper is not a misapplication of the money of the bank.⁷ A conversion, by a director, of money of the bank, of which he has acquired possession or control by means of his overdraft, drawn without right and with intent to defraud, is a misappropriation of money of the association, within the meaning of the statute.⁸

§ 1171. Willful Misapplication — Indictment.

The words "willfully misapplies", having no settled technical meaning (such as the word "embezzles" has in the statutes, or the words "steal, take, and carry away" have at common law), do not of themselves fully and clearly set forth every element necessary to constitute the offense intended to be punished; they must be supplemented by further averments, showing how the misapplication was made and that it was an unlawful one. Without such averments there is no sufficient description of the exact offense with which the defendant is charged, so as to enable him to defend himself against it, or to plead an acquittal or conviction in bar of a future prosecution for the same offense.¹

⁴ *United States v. Britton*, 108 U. S. 193, 27 L. ed. 701, 2 S. C. 526.

⁵ *Ibid.*, but see, amendatory statutes, *supra*, and later decisions.

⁶ *Adler v. United States*, 182 Fed. 464, 104 C. C. A. 608 (5th Cir.).

⁷ *Adler v. United States*, *supra*, citing *Coffin v. United States*, 162 U. S. 677.

⁸ *United States v. Warner*, 26 Fed. 616.

§ 1171. ¹ *Batchelor v. United States*, 156 U. S. 426, 429, 39 L. ed.

An averment is sufficient which definitely and fully alleges the value in lawful money of the United States of the misapplied property, without showing what was misapplied — whether moneys, funds, or credits.² An allegation of misapplication “of the moneys, funds and credit of such association, without the knowledge and consent thereof”, is insufficient without the averment that it was without the knowledge and approval of the board of directors or the discount committee of the bank.³ Where an officer of a bank is charged with the fraudulent misapplication of its funds in the payment of several and distinct notes, each payment constitutes a separate misapplication, and must be charged in a separate count.⁴ A count charging that a director of a national bank, between specified dates, abstracted and misapplied a certain amount of the moneys, funds and credits of the bank is too general, without particularization to indicate what is intended to be proved.⁵ Under a count for conspiracy to misapply funds of a national bank, it is sufficient to show an agreement to commit that offense made between either the cashier or the vice president of the bank and the defendants for whose benefit the money is alleged to have been withdrawn.⁶ An indictment charging an officer of a national bank with willful misapplication of the funds, resulting in his advantage, with the illegal intent to injure and defraud the bank by receiving and discounting with its moneys an unsecured promissory note of a named party, whereby the proceeds of the discount of the note were totally lost to the bank, sufficiently charges a violation of the section. It is not necessary to allege conversion by the officer of the bank and also

478, 15 S. C. 446; *United States v. Britton*, 107 U. S. 655, 661, 27 L. ed. 520, 2 S. C. 512; *United States v. Northway*, 120 U. S. 327, 332, 30 L. ed. 664, 7 S. C. 580; *Evans v. United States*, 153 U. S. 584, 587, 38 L. ed. 830, 14 S. C. 934; *United States v. Smith*, 152 Fed. 542; *United States v. Heinze*, 161 Fed. 425; *United States v. Martindale*, 146 Fed. 280, 286.

² *United States v. Heinze*, *supra*, disapproving the refinements in *United States v. Smith*, 152 Fed.

542, 544. But see *United States v. Heinze*, 218 U. S. 532, 54 L. ed. 1139, 31 S. C. 98.

³ *United States v. Martindale*, *supra*, citing *United States v. Britton*, 108 U. S. 193, 197, 27 L. ed. 701, 2 S. C. 526; *United States v. Youtsey*, 91 Fed. 868, 869.

⁴ *United States v. Martindale*, *supra*.

⁵ *United States v. Martindale*, *supra*.

⁶ *Prettyman v. United States*, 180 Fed. 30, 103 C. C. A. 384 (6th Cir.).

by the recipient of the proceeds of the discount.⁷ An indictment charging that an officer unlawfully "converted" certain "moneys, funds and credits to the use of another", sufficiently charges the manner in which the misapplication was effected.⁸ Possession of the funds is sufficiently alleged by an averment that the defendant was president of the bank, and as such had access to its funds, properties, moneys, and credits, with duties to perform in the control, management and application.⁹ It is not necessary to allege that the acts were done feloniously, the statute declaring them to be misdemeanors.¹⁰ An indictment charging defendants with aiding and abetting a director of a national bank in misapplying the money of the bank must state facts showing a misapplication of money of the bank committed by the director.¹¹ An allegation of misapplication of "certain moneys, funds, and credits" of the bank does not render an indictment bad for indefiniteness, when it is followed by an explicit statement that the offense consisted in discounting for his own benefit a note known by him at the time to be worthless.¹² A description of a note, not the subject matter of the offense, by giving the date, amount and name of maker, so as to advise the accused with reasonable certainty what note is intended, is sufficient.¹³ It is not a substantial defect to aver that the misapplication charged was without the knowledge and consent of the bank, its directors, etc., instead of using the disjunctive form.¹⁴ It is sufficient to allege generally that the misapplication charged was done for the use, benefit, and advantage of the accused, or some person or company other than the bank, and a conversion of funds or credit need not be averred.¹⁵ An indictment which follows the language of the statute as to embezzling, abstracting and misapplying moneys, funds, and credits of the bank at various times, need not

⁷ *United States v. Heinze*, 218 U. S. 532, 54 L. ed. 1139, 31 S. C. 98.

⁸ *Dickinson v. United States*, 159 Fed. 801, 86 C. C. A. 625 (1st Cir.); *United States v. Eastman*, 132 Fed. 551.

⁹ *United States v. Eastman*, *supra*.

¹⁰ *Ibid.*, but see Sec. 335 of Penal Code.

¹¹ *United States v. Warren*, 26 Fed. 616.

¹² *Rieger v. United States*, 107 Fed. 916, 47 C. C. A. 61 (8th Cir.).

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ *Rieger v. United States*, *supra*, but see *contra* *United States v. Warner*, 26 Fed. 616, *citing* *United States v. Britton*, 107 U. S. 655, 666, —, 27 L. ed. 520, 2 S. C. 512.

specify how much was moneys, how much funds, and how much credits.¹⁶

§ 1172. False Entries — Meaning of Term.

The term “false entries”, as used in the statute, when taken with its connecting words, means more than simply an untrue or incorrect entry; for Congress did not thereby intend a mere mistake as to the entry. A mistake honestly made will not expose the maker to punishment under this law. The false entry contemplated in the statute is an entry known to the maker to be untrue and false, and by him intentionally entered while so knowing its false and untrue nature.¹ Entries of transactions actually consummated between officers of a bank and a third party are not false entries within the section, although the transactions were unjustifiable, unauthorized or fraudulent.² The entry by the cashier on the books of a check as a “cash item”, which actually entered into a transaction of the bank, will not support an indictment of the cashier, although it is further charged that he knew the check to be worthless or fraudulent, and made the entry with intent to deceive, etc. The truth of what the cashier actually did with the bank’s cash as to this check, and statement he made about the cash in the entry on the books of the bank, was not in any way altered by the fact that he knew the check was “worthless and fraudulent.”³ It cannot be a false entry to make a recital on the books of the bank which speaks the truth.⁴ Concealment by the president of a national bank from the bookkeeper of facts necessary to enable the latter to make accurate entries in the books of the bank, resulting in his making false entries, does not violate the section.⁵ The entry of a slip upon the books of the bank, if the matter con-

¹⁶ Breese v. United States, 106 Fed. 680, 45 C. C. A. 535 (4th Cir.), *contra* United States v. Smith, 152 Fed. 542.

§ 1172. ¹ United States v. Graves, 53 Fed. 634, 644.

² Twining v. United States, 141 Fed. 41, 72 C. C. A. 529 (3d Cir.).

³ United States v. Young, 128 Fed. 111, 115.

⁴ United States v. Young, *ibid.*, citing Coffin v. United States, 156 U. S. 432, 446, 39 L. ed. 481, 15 S. C. 394; Graves v. United States, 165 U. S. 323, 41 L. ed. 732, 17 S. C. 393.

⁵ United States v. McClarty, 191 Fed. 523.

tained in that deposit slip is not true, is a false entry. If the statement made upon the deposit slip is false, the entry of it in the bank and the books of the bank is false.⁶ Counts of an indictment held sufficient against the president of a national bank for making a false entry within this section are given in detail in *United States v. Britton*.⁷ The erasure of figures constituting part of a number already written on an account book of a national bank and the writing of different figures in place thereof, is "making an entry" within the section.⁸ False entries within the statute are the offenses of those only who knowingly made them or caused them to be made. One who is not so responsible for a false entry is not guilty of making a false entry, though he verifies the bank's report containing it.⁹ There is no penalty affixed by Section 5211 to the false verification of the president or cashier. The offense is in making the false entry, with intent to injure or defraud the bank.¹⁰ If an overdraft is made and allowed under circumstances which make the transaction a fraud upon the bank, the entry of the transaction just as it occurred is not a false entry.¹¹ The entry as a loan and discount of a discounted accommodation note given by a solvent person to meet the requirements of a bank examiner as to overdrafts by the officers of the amounts of their salaries, and the inclusion of the note in a report by the cashier to the Comptroller of the Currency as a loan and discount, does not constitute the making of a false entry within the section.¹² The entry of a deposit of money placed in the bank in a sack, to be returned to the depositor in the same condition in which it was placed there, without mingling it with the funds of the bank, for the purpose of making a showing of money to a bank examiner, was held to be a false entry.¹³

⁶ *Agnew v. United States*, 165 U. S. 36, 41 L. ed. 624, 17 S. C. 235; *United States v. Wilson*, 176 Fed. 806, 809.

⁷ 107 U. S. 655, 656, 27 L. ed. 520, 2 S. C. 512.

⁸ *United States v. Crecilius*, 34 Fed. 30.

⁹ *United States v. Herrig*, 204 Fed. 124.

¹⁰ *Cochran and Sayre v. United States*, 157 U. S. 286, 39 L. ed. 704, 15 S. C. 628.

¹¹ *Dow v. United States*, 82 Fed. 904, 910, 27 C. C. A. 140 (8th Cir.).

¹² *Hayes v. United States*, 169 Fed. 101, 94 C. C. A. 449 (8th Cir.).

¹³ *United States v. Peters*, 87 Fed. 984.

§ 1173. False Entries — Direction.

The making of false entries by a clerk in the bank, by direction of the accused, the bank's president, constituted the accused a principal in the offense of making false entries.¹ The crime of making false entries in the books of a national bank may be committed personally or by direction.² It is immaterial whether the defendant made the entries in person or caused them to be made by a clerk or bookkeeper.³

§ 1174. False Entries — Intent Necessary.

The making of the false entry is not in itself what the statute condemns; it is the making of it with any of the several intents mentioned therein. The gravamen of the offense is not the mere making of the false entry; but coupled with the act there must be one of the intents condemned by the statute. A false entry made by mistake, or one knowingly made, but with no intent to injure, defraud, or deceive in any of the respects condemned by the statute, would not be an offense against the statute.¹ To warrant a conviction for a false entry on the books of the bank the jury must find not only that the entry was false on the books of the bank, but was knowingly false; it is necessary that the defendant knew at the time that it was made that the entry was false.² An indictment charging a national bank officer with false entries "with intent to deceive any agent appointed to examine the affairs of the bank" was held sufficiently to designate the person intended to be deceived.³ An allegation that such entries were made "in a book of said bank known as 'Journal K'" sufficiently alleges that the book was a book of the association within the section.⁴ The verb "to deceive" in the statute

§ 1173. ¹ *In re Van Campen*, 2 Ben. 419, 28 Fed. Cas. No. 16835; *United States v. Allen*, 47 Fed. 696; *United States v. Allis*, 73 Fed. 165.

² *Agnew v. United States*, 165 U. S. 36, 41 L. ed. 624, 17 S. C. 235; *United States v. Wilson*, 176 Fed. 806, 809; *Richardson v. United States*, 181 Fed. 1, 104 C. C. A. 69 (3d Cir.).

³ *Morse v. United States*, 174 Fed. 539, 98 C. C. A. 321 (2d Cir.).

§ 1174. ¹ *United States v. Norton*, 188 Fed. 256; *United States v. Graves*, 53 Fed. 634, 644; *Richardson v. United States*, 181 Fed. 1, 104 C. C. A. 69 (3d Cir.).

² *United States v. Wilson*, 176 Fed. 806, 809.

³ *Billingsley v. United States*, 178 Fed. 653, 101 C. C. A. 465 (8th Cir.).

⁴ *Ibid.*

is held so referable to the antecedent "with intent" as to subject any one who makes a false entry to the penalties of the law provided he makes it with the intent either to injure or defraud, etc. or to deceive, etc.⁵ Directors are officers within the meaning of the clause "to deceive any officer of the association." Intent to deceive any one officer is as criminal as intent to deceive all of them.⁶ A conviction cannot be had where it appears that the officers alleged to have been deceived were accomplices in the speculation to hide which the false entries were made.⁷ The fact that the officers were not actually deceived is not conclusive proof of the absence of intent to deceive.⁸

§ 1175. False Entries — Indictment.

If it is the government's purpose to charge the making of false entries because of the receiving and crediting of checks drawn thereon by parties who had no funds in the bank, the indictment should set forth a description of the checks, with an averment of the reasons why they were to be deemed false or valueless.¹ Allegations that false entries were made "with intent to injure and defraud the said association and certain persons to the grand jurors unknown" are sufficient.² An indictment under this section alleging that the accused, while president of a national bank, made a false entry in a report to the Comptroller of the Currency, that the lawful money reserve in the bank, consisting of gold coin, was \$23,955, when in fact the bank only had \$21,955 in gold coin as lawful money reserve, was held not objectionable, though there was no allegation that the lawful reserve exceeded the amount on hand, the gist of the offense being the making of false entries in the report.³

§ 1176. Duplicity.

The same false entry may give rise to two distinct offenses, according as it may accompany either of the two intents, to injure

⁵ Billingsley v. United States, *supra*, disapproving McKnight v. United States, 111 Fed. 735, 49 C. C. A. 594 (6th Cir.), so far as it holds otherwise.

⁶ United States v. Means, 42 Fed. 599.

⁷ *Ibid.*

⁸ *Ibid.*

§ 1175. ¹ Dow v. United States, 82 Fed. 904, 27 C. C. A. 140 (8th Cir.).

² United States v. Britton, 107 U. S. 655, 27 L. ed. 520, 2 S. C. 512; United States v. Potter, 56 Fed. 83.

³ Clement v. United States, 149 Fed. 305, 79 C. C. A. 243 (8th Cir.).

or defraud or to deceive, and when in one count a false entry is charged as having been done with the intent to injure or defraud and with the intent to deceive, it is duplicitous.¹

§ 1177. False Reports — What the Term Includes.

Neither false reports nor false verifications are within the statute. False entries in reports are untrue statements of items of account by written words, figures, or marks made therein. An unfilled blank in a report, viz.: "Notes and bills rediscounted . . ." when in fact the bank had rediscounted \$5000 worth of its paper is not a false entry.¹ A false entry in a report of the condition of the bank, or in the books of the bank, is not punishable under this statute unless it was made by the defendant or by his directions, with the intent either (1) to injure or defraud the bank, or some other corporation, or some firm or person; or (2) to deceive some officer of the bank; or (3) to deceive some agent appointed or that thereafter is to be appointed to examine the affairs of the bank.² Under this section the making of false entries with intent to deceive any agent appointed to examine the affairs of a national bank, includes an attempt to deceive the Comptroller of the Currency by false entries made in a report directly to him under Section 5211.³ Under this section false entries as to the condition of a national bank may be made with intent to injure the bank, although they exhibit a more favorable condition of the bank than would have appeared if the truth had been stated.⁴ An indictment charging directors with making false entries in a report to the Comptroller of the Currency on the condition of the bank cannot be sustained under this section, since under Section 5211 their sole duty in regard to such reports is to attest them by their signatures; and any entries therein by them would be mere spoliation and not "false", within the meaning of the section.⁵ To constitute the offense of making a false report of

§ 1176. ¹ *United States v. Norton*, 188 Fed. 256, 260.

• § 1177. ¹ *United States v. Herrig*, 204 Fed. 124.

² *United States v. Allis*, 73 Fed. 165, 170.

³ *United States v. Corbett*, 215

U. S. 233, 54 L. ed. 173, 30 S. C. 81; *United States v. Hughitt*, 45 Fed. 47.

⁴ *United States v. Corbett*, *supra*; *Richardson v. United States*, 181 Fed. 1, 104 C. C. A. 69 (3d Cir.).

⁵ *United States v. Potter*, 56 Fed. 83. *See also Cochran and*

the condition of a national bank, it is not necessary that such report, when made, should have been made in response to a call or request of the Comptroller.⁶ The section includes a report voluntarily made as well as one required by law, if the false entry is made with the requisite unlawful intent.⁷ The fact that entries in a report by a national bank to the Comptroller accurately state the facts as shown by the books does not prevent them from being false, where the books themselves are inaccurate.⁸ Congress did not intend to punish a bank director or bank official who inadvertently, through mistake, or perhaps negligently, made in a report an entry which, though in fact incorrect or false, was believed by such bank officer to be true.⁹ In a prosecution of officers for making false reports to the Comptroller, it was held proper to charge that the defendants might be convicted on proof that the false reports were made in pursuance of a previous arrangement between the clerk who made them and the defendants who instigated them, the section being applicable to counseling and procuring in advance of the act.¹⁰

§ 1178. False Reports — Indictment.

In an indictment against the president and the assistant cashier of a national bank for making a false entry in a report, under this section, the report need not be described with technical accuracy.¹ The report need not be set out in full. A reference to the report by its date, etc., so as to fully identify the document, and a specification of the particular false statement complained of, in such language as will advise the defendant of what he is accused, is sufficient.² An averment of the date when made,

Sayre *v.* United States, 157 U. S. 286, 39 L. ed. 704, 15 S. C. 628.

⁶ Bacon *v.* United States, 97 Fed. 35, 38 C. C. A. 37 (8th Cir.); United States *v.* Hughitt, *supra*.

⁷ Harper *v.* United States, 170 Fed. 385, 389, 95 C. C. A. 555 (8th Cir.).

⁸ Morse *v.* United States, 174 Fed. 539, 98 C. C. A. 321 (2d Cir.).

⁹ United States *v.* Graves, 53 Fed. 634, 644; United States *v.* Allen, 47 Fed. 696; United States *v.* Allis, *supra*.

¹⁰ Kettenbach *v.* United States, 202 Fed. 377, 120 C. C. A. 505 (9th Cir.).

§ 1178. ¹ Cochran and Sayre *v.* United States, 157 U. S. 286, 39 L. ed. 704, 15 S. C. 628; Harper *v.* United States, 170 Fed. 385, 95 C. C. A. 555 (8th Cir.); United States *v.* French, 57 Fed. 382.

² Dorsey *v.* United States, 101 Fed. 746, 751, 41 C. C. A. 652 (8th Cir.).

and that it was a report made to the Comptroller of the Currency showing the resources and liabilities of the bank on a certain date, is sufficient to authorize the presumption that it was a report made by the bank under this section.³ Where an indictment against a national bank cashier described, with great particularity and at considerable length, the entries, the falsification of which was charged, their position by book, report, column and line being given, it was held not defective for indefiniteness because it did not name the clerks making the entries.⁴ For the purposes of this section the making of the false entry in a report, its verification, attestation and delivery to the Comptroller of the Currency may be regarded as simultaneous, so that there is no repugnance in failing to allege that any of these things occurred in consecutive order.⁵

§ 1179. Aiding and Abetting.

The words "aids or abets", as used in this section, are to be construed according to their natural import. An indictment charging aiding and abetting a clerk in a national bank to misappropriate its funds need not allege with particularity the nature of the aiding and abetting rendered. Such an indictment which alleges that the clerk was also a depositor, that he obtained possession of the bank's funds by means of overdrafts, and that he neglected to inform the bank's officers thereof, but, instead, secreted the same by false entries, sufficiently set out that the funds were misapplied by the clerk. The acceptance by the accused of the moneys of the bank, with knowledge of their misappropriation by a clerk, and the accused's using or pretending to use them for gambling, constituted "aiding and abetting" within the section.¹ To authorize a conviction of aiding and abetting an officer in the misapplication of a bank's funds it is not necessary to allege or prove a conspiracy, or that the principal offender has been convicted; both offenses being misdemeanors.² An indictment charging aiding and abetting misapplication of funds which alleges that overdrafts made by the defendant were made by him in aid

³ *Harper v. United States*, *supra*.

⁴ *Richardson v. United States*, 181 Fed. 1, 104 C. C. A. 69 (3d Cir.).

⁵ *United States v. French*, 57 Fed. 382.

§ 1179. ¹ *Keliher v. United States*, 193 Fed. 8, 114 C. C. A. 128 (1st Cir.).

² *United States v. Hillegass*, 176 Fed. 444, but, *see* § 996, *supra*.

of the unlawful misapplication, fraudulently and with intent to injure and defraud the bank, was held sufficient.³ No one is permitted to aid or abet the willful misapplication of the funds of a national bank because he hopes in the future to repair his wrong.⁴ Where a violation of the statute is charged against an officer of the bank and an outsider, the former must be prosecuted as a principal, and the latter as an aider and abettor; the aiding and abetting applies only to those not connected with the bank who counsel or incite those who are.⁵ Counts charging the procuring and counseling the false entry in a report before the fact are valid, such acts being covered by the clause extending the penalty to any one who "abets" an officer or agent in the prohibited acts.⁶ It is not necessary in an indictment against an aider and abettor to aver that he was an officer of the bank, or occupied any special relation to it when committing the offense.⁷

§ 1180. Variance.

Under an indictment charging the making of false entries in a report to the Comptroller, with intent to injure and defraud the bank and its stockholders, and to deceive its directors, it is not sufficient to prove an intent to deceive other persons, such as creditors, depositors, the Comptroller, or the public.¹

§ 1181. Evidence.

The testimony of a bank examiner is admissible to show false entries, so far as it consists of knowledge derived from his investigation of the books, and not of conclusions based partly on statements of bank officers and clerks.¹ On the trial of a bank president for making false reports, prior reports, attested by him, containing false statements, with testimony that such misstatements were called to his attention by an examiner, are admissible on the question of intent.² It is reversible error to admit in evi-

³ *United States v. Hillegass*, 176 Fed. 444.

⁴ *United States v. Kenney*, 90 Fed. 257.

⁵ *Richardson v. United States*, 181 Fed. 1, 104 C. C. A. 69 (3d Cir.).

⁶ *United States v. French*, 57 Fed. 382.

⁷ *Coffin v. United States*, 156 U. S. 432, 39 L. ed. 481, 15 S. C. 394.

§ 1180. ¹ *United States v. Allen*, 47 Fed. 696.

§ 1181. ¹ *United States v. Allen*, 47 Fed. 696.

² *Bacon v. United States*, 97 Fed. 35, 38 C. C. A. 37 (8th Cir.).

dence the books of a bank not involved in the case, and to allow an expert accountant to testify as to what they show, in the absence of testimony which would allow the books themselves to be proved, unless the books are admitted to be correct. Otherwise, items in books of account might be given in evidence through the testimony of an expert accountant when the books themselves would not be admissible.³ But testimony by an expert accountant who had examined the books and records of the company to which loans and advances had been made, and who had made summaries thereof, was held admissible in a prosecution for willful misapplication and making false entries on proof of loss of such books and records.⁴

§ 1182. Coupled with Section 5440.

A violation of this section constitutes "an offense against the United States", within the meaning of Section 5440, now Section 37 of the Criminal Code, and is indictable thereunder.¹

§ 1183. Loans or Gratuities to Bank Examiners — Fees to Directors and Other Officers — Disclosure of Loans by Examiners.

Section 22 of the Federal Reserve Act, as amended by Section 11 of the Act of June 21, 1917, provides,

That no member bank or any officer, director or employee thereof shall make any loan or grant any gratuity to any bank examiner. Violation by a bank officer, director or employee is a misdemeanor punishable by imprisonment not exceeding one year or fine of not more than \$5000 or both; and a further fine of a sum equal to the money so loaned or gratuity given. An examiner who accepts such a loan or gratuity is subject to the same penalty, and is disqualified from thereafter holding office as a national bank examiner. No officer, director, employee or attorney of a member bank may receive, directly or indirectly, any fee, commission, gift, or other consideration for any bank

³ *Phillips v. United States*, 201 Fed. 259, 269, 120 C. C. A. 149 (8th Cir.).

⁴ *Galbreath v. United States*, 257 Fed. 648, — C. C. A. — (6th Cir.).

§ 1182. ¹ *Scott v. United States*, 130 Fed. 429, 64 C. C. A. 631 (6th Cir.).

transaction, other than the usual salary or director's fee and a reasonable fee for services rendered to the bank. No examiner may disclose the names of borrowers on the collateral for loans of a member bank to other than the proper officers of the bank without the written permission of the Comptroller of the Currency or the bank's board of directors, except when ordered by a court of competent jurisdiction, or by Congress. Violation of these provisions is punishable by fine not exceeding \$5000 or imprisonment not exceeding one year, or both.

CHAPTER LXVIII

BANKRUPTCY

§ 1184. Jurisdiction.

§ 1185. Offenses Committed by Bankrupt or Other Persons — Punishment —
Fraudulent Concealment.

§ 1186. Specific Offenses — Fraudulent Appropriation of Bankrupt's Assets
by Trustees.

§ 1187. Specific Offenses, *Continued* — Making False Oaths.

§ 1188. Presenting False Claims — Receiving Bankrupt's Property.

§ 1189. Practicing Extortion.

§ 1190. The Statute of Limitations.

§ 1184. Jurisdiction.

The Bankruptcy Act ¹ provides :

That the courts of bankruptcy as hereinbefore defined, viz. : the district courts of the United States in the several States, the supreme court of the District of Columbia, the district courts of the several Territories, and the United States courts in the Indian Territory and the District of Alaska, are hereby made courts of bankruptcy, and are hereby invested, within their respective territorial limits as now established, or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings, in vacation in chambers and during their respective terms, as they are now or may be hereafter held, to . . . arraign, try and punish bankrupts, officers and other persons, and the agents, officers, members of the board of directors or trustees, or other similar controlling bodies, of corporations for violations of this Act, in accordance with the laws of procedure of the United States now in force, or such as may be hereafter enacted, regulating

§ 1184. ¹ Sec. 2 of Chap. II, 30 Stat. L. 545.

trials for the alleged violation of laws of the United States;² . . . extradite bankrupts from their respective districts to other districts;³ . . . punish persons for contempts committed before referees.⁴

§ 1185. Offenses Committed by Bankrupt or Other Persons — Punishment — Fraudulent Concealment.

A person shall be punished, by imprisonment for a period not to exceed two years, upon conviction of the offense of having knowingly and fraudulently concealed while a bankrupt, or after his discharge, from his trustee, any of the property belonging to his estate in bankruptcy.¹

Under this subdivision one who knowingly conceals assets while a bankrupt or after his discharge is guilty of such an offense under Section 29, b, 1.² To "conceal" means to "secrete", "falsify", and "mutilate."³ The person must be actually a bankrupt or have been judicially declared a bankrupt.⁴ It is sufficient to convict under this section if the assets are concealed from the trustee after his appointment.⁵ This section extends to officers of a corporation such as directors and stockholders⁶ and also to a partner who conceals property belonging to a bankrupt partnership, although he himself had not been adjudicated bankrupt.⁷ An indictment for conspiracy will lie under Section 37 of the Penal Law, making it an offense to conspire to commit any offense against the United States, for conspiring to conceal from a trustee in bankruptcy property belonging to the estate, in violation of Section 29, b, 1.⁸ In order to constitute an offense under Section 29, b, 1, the concealment must have been know-

² Sub. 4, Sec. 2, 30 Stat. L. 545.
See also CONSPIRACY.

³ Sub. 14, Sec. 2, 30 Stat. L. 546,
ibid. *See also* EXTRADITION.

⁴ Sub. 16, Sec. 2, 30 Stat. L. 546,
ibid. *See also* CONTEMPT.

§ 1185. ¹ Sub. b, Sec. 29 a, Bankruptcy Act, 1898, 30 Stat. L. 554.

² *United States v. Freed*, 179 Fed. 236; *United States v. Greenbaum*, 252 Fed. 259; *In re Bacon*, 205 Fed. 545.

³ *United States v. Phillips*, 196 Fed. 574.

⁴ *Kaufman v. United States*, 212 Fed. 613, 129 C. C. A. 149 (2d Cir.); *United States v. Rabinowich*, 238 U. S. 78, 59 L. ed. 1211, 35 S. C. 682.

⁵ *Kaufman v. United States*, *supra*.

⁶ *Wolf v. United States*, 238 Fed. 902, 152 C. C. A. 36 (4th Cir.).

⁷ *Conetto v. United States*, 251 Fed. 42, 163 C. C. A. 292 (9th Cir.).

⁸ *United States v. Rosenstein*, 211 Fed. 738.

ingly and fraudulently made; for this reason there can be no conviction of such an offense where the concealment complained of was unintentionally made by mistake, or in ignorance.⁹ If the bankrupts conceal a large part of their assets, they may be committed until they pay the trustees a sum equal to the value of the concealed assets;¹⁰ the offense of concealing assets from a trustee is a felony.¹¹ In a prosecution for concealing assets the burden of proof is on the government to establish the guilt beyond a reasonable doubt.¹²

§ 1186. Specific Offenses — Fraudulent Appropriation of Bankrupt's Assets by Trustees.

It is beyond the power of the court to punish the offenses defined in Subsection c, Section 29 *a*, of the Bankruptcy Act by summary imprisonment for contempt.¹ The bankrupt may be released on *habeas corpus* if no facts are shown that he acted in a fiduciary capacity.²

§ 1187. Specific Offenses, *Continued* — Making False Oaths.

Subsection 2 of Section 29 *a*, subdivision *b*, punishes the making of false oaths. The statute reads: "Made a false oath or account in, or in relation to, any proceeding in bankruptcy." "False oaths" refers to any proceeding in bankruptcy before a referee in an investigation of specifications filed against his discharge.¹ The false oath must be knowingly and fraudulently made, and an oath may be considered to have been so made when made by a person who states matters which he does not believe to be true, willfully and contrary to his oath.² Materiality of a false oath is not the test of whether it does or does not bar a bankruptcy discharge.³ Where a witness undertook to answer a question by which it was sought to ascertain what other places of business

⁹ *United States v. Rhodes*, 212 Fed. 513.

¹⁰ *In re Greenberg*, 106 Fed. 496.

¹¹ *Kaufman v. United States*, *supra*.
See also *CONTEMPT*.

¹² *Chodkowski v. United States*, 194 Fed. 858, 114 C. C. A. 624 (7th Cir.).

§ 1186. ¹ *In re McNaught*, 225 Fed. 511.

² *Barrett v. Prince*, 143 Fed. 302, 74 C. C. A. 440 (7th Cir.); *In re Adler*, 152 Fed. 422, 81 C. C. A. 564 (2d Cir.).

§ 1187. ¹ *In re Sheinberg*, 223 Fed. 218.

² *In re Hale*, 206 Fed. 856.

³ *In re Sheinberg*, *supra*.

she had, and she failed to state these places, such failure was held to be equivalent to swearing to a statement of assets which was incomplete and therefore false within the meaning of this section.⁴

§ 1188. Presenting False Claims — Receiving Bankrupt's Property.

Subsection 3 of the said Section 29 *a*, subdivision *b*, punishes a person, when he "presented under oath any false claim for proof against the estate of a bankrupt, or used any such claim in composition personally or by agent, proxy, or attorney, or as agent, proxy or attorney", while the fourth subsection of the same statute reads as follows: "or received any material amount of property from a bankrupt after filing of the petition with intent to defeat this act." To receive any material amount of property with intent to defeat this act from a bankrupt after filing of the petition in bankruptcy is punishable by imprisonment not to exceed two years.¹

§ 1189. Practicing Extortion.

The statute punishes the practice of extorting money from a person in failing circumstances. Subsection 5 of subdivision *b* of Section 29 *a* of the Bankruptcy Act reads as follows:

" . . . Extorted or attempted to extort any money or property from any person as a consideration for acting or forbearing to act in bankruptcy proceedings."

Under this section it has been held that a promise by the bankrupt to a creditor who advanced the bankrupt money to effect a composition of creditors, to pay the balance of his debt, does not violate this section.¹ An attorney for a trustee who forces the bidder to pay him a sum of money as a condition to his advising the trustee to accept the bid is guilty of extortion.²

⁴ United States *v.* Gray, 255 Fed. 98.

§ 1188. ¹ Clay *v.* Waters, 178 Fed. 385, 101 C. C. A. 645 (8th Cir.); In re Boyd, 228 Fed. 1003.

§ 1189. ¹ Zavelo *v.* Reeves, 227 U. S. 625, 57 L. ed. 676, 33 S. C. 365.

² United States *v.* Dunkley, 235 Fed. 1000.

§ 1190. The Statute of Limitations.

A person shall not be prosecuted for any offense arising under this act unless the indictment is found or the information is filed in court within one year after the commission of the offense.

Under this section it has been held that this limitation does not apply to prosecutions for conspiracies to commit an offense under Revised Statutes 5440 (now Penal Law, Section 37) for a conspiracy to commit an offense thereunder.¹ But a conviction for false swearing under the Bankruptcy Act cannot be sustained without proof that the indictment was found within one year of the commission of the offense.²

§ 1190. ¹ *United States v. Rabinowich*, 238 U. S. 78, 59 L. ed. 1211, 35 S. C. 682.

² *Rosenthal v. United States*, 248 Fed. 684, 160 C. C. A. 584 (8th Cir.).

CHAPTER LXIX

TIMBER AND STONE LANDS

§ 1191. Perjury.

§ 1192. Violation of Rules for Protection of Forest Reserves.

§ 1191. Perjury.

Section 2 of the Act of June 3, 1878, c. 151, 20 Stat. L. 89, reads as follows :

Any person desiring to avail himself of the provisions of this act shall file with the register of the proper district a written statement in duplicate, one of which is to be transmitted to the General Land Office, designated by legal subdivisions the particular tract of land he desires to purchase, setting forth that the same is unfit for cultivation, and valuable chiefly for its timber or stone; that it is uninhabited; contains no mining or other improvements, except for ditch or canal purposes, where any such do exist, save such as were made by or belong to the applicant, nor, as deponent verily believes, any valuable deposit of gold, silver, cinnabar, copper, or coal; that deponent has made no other application under this act; that he does not apply to purchase the same on speculation, but in good faith to appropriate it to his own exclusive use and benefit; and that he has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whatsoever, by which the title which he might acquire from the government of the United States should inure, in whole or in part, to the benefit of any person except himself; which statement must be verified by the oath of the applicant before the register or the receiver of the land-office within the district where the land is situated; and if any person taking such oath shall swear falsely in the premises, he shall be subject to all the pains and penalties

of perjury, and shall forfeit the money which he may have paid for said lands, and all right and title to the same; and any grant or conveyance which he may have made, except in the hands of bona fide purchasers, shall be null and void.

An indictment will not lie under Revised Statute § 4746, as amended, for making a false affidavit under this section.¹ The respect due to a patent raises the presumption that all the preceding steps required by law were duly observed; and in a suit to vacate a patent on the ground of fraud practiced on the land department, the government has the burden of proof, which it must sustain by evidence which commands respect and produces conviction.² The statutory initial statement may be made upon knowledge and information other than personal observation. Therefore statements on the blank forms furnished by the Land Department that the applicant had personally examined the land applied for, and that he knew from his own personal knowledge that it was unfit for cultivation, uninhabited, etc., though untrue, are insufficient to sustain a charge of subornation of perjury.³ "Improvement" means valuable improvements. An abandoned and useless cabin and fence are not such improvements.⁴ The facts stated in an application, including the fact that the application is not made for the purpose of sale, must not only be true when made, but must also be true when the land is paid for and the applicant receives his certificate of purchase or receiver's receipt.⁵ The statute does not confer the right to buy the kind of land it specifies, on one who, when making his application, proposes to acquire the land on speculation, and with no intention of appropriating it to his own exclusive benefit.⁶ For evidence as to acts and conduct to show speculation, see case in note.⁷

§ 1191. ¹ *London v. United States*, 171 Fed. 82, 96 C. C. A. 186 (8th Cir.); *United States v. Keitel*, 211 U. S., 370, 53 L. ed. 230, 29 S. C. 123.

² *United States v. Porter Fuel Co.*, 247 Fed. 769, 159 C. C. A. 627 (8th Cir.).

³ *Hoover v. Salling*, 110 Fed. 43, 49 C. C. A. 26 (7th Cir.); *Robnett v. United States*, 169 Fed. 778, 95 C. C. A. 244 (9th Cir.).

⁴ *United States v. Budd*, 43 Fed. 630.

⁵ *United States v. Brace*, 149 Fed. 869.

⁶ *Taylor v. United States*, 231 Fed. 938, 146 C. C. A. 134 (5th Cir.).

⁷ *United States v. Budd*, 144 U. S. 154, 36 L. ed. 384, 12 S. C. 575; *Olson v. United States*, 133 Fed. 849, 67 C. C. A. 21 (8th Cir.).

Purchasers from the entryman prior to the issue of the patent are not bona fide purchasers protected against cancellation of the entry for fraud under this section.⁸ A purchaser from the patentees for value, and without notice of any fraud on the part of the entrymen, is a bona fide purchaser within the act, and as such entitled to protection, although he may have acquired an interest in the lands under a contract for the standing timber before the patents issued; since, by the doctrine of relation, the patents, when issued, became operative as of the date of the entries.⁹ A purchaser of timber lands after receivers' final receipts have issued is entitled to protection, under the act, as a bona fide purchaser, against the cancellation, for the original frauds of the entrymen, of the patents afterwards issued, unless he is shown to have had actual notice of such fraud.¹⁰ A bona fide purchaser of standing timber from the holders of receivers' final receipts for the purchase price of lands entered under the act cannot, upon avoidance for the fraud of the entrymen of the patents afterwards issued, be required to account to the federal government for the timber which it has paid for and cut and removed in reliance upon the purchase.¹¹ After he has made his initial application and before final proof, an applicant for purchase may contract to sell the title thereafter to be acquired, and the intending purchaser may lawfully advance him the money with which to make final proof.¹² The land department has authority to cancel and annul an entry of public land when its officers are convinced, upon a proper showing, that the entry was fraudulently made; this may be done until a patent has been issued and accepted by the patentee.¹³ But the cancellation of a certificate

⁸ *Hawley v. Diller*, 178 U. S. 476, 44 L. ed. 1157, 20 S. C. 986.

⁹ *United States v. Detroit Timber, etc. Co.*, 200 U. S. 321, 50 L. ed. 499, 26 S. C. 282.

¹⁰ *United States v. Clark*, 200 U. S. 601, 50 L. ed. 613, 26 S. C. 340, *affirming* 138 Fed. 294.

¹¹ *United States v. Detroit Timber, etc. Co.*, *supra*.

¹² *United States v. Biggs*, 211 U. S. 507, 53 L. ed. 305, 29 S. C. 181; *United*

States v. Budd, 43 Fed. 630; *United States v. Kettenbach*, 208 Fed. 209, 125 C. C. A. 409 (9th Cir.); *United States v. Barber Lumber Co.*, 172 Fed. 948; *Williamson v. United States*, 207 U. S. 425, 52 L. ed. 278, 28 S. C. 163.

¹³ *Hawley v. Diller*, 178 U. S. 476, 44 L. ed. 1157, 20 S. C. 986, *affirming* 81 Fed. 651, 26 C. C. A. 514 (9th Cir.), *reversing* 75 Fed. 946; *American Mortgage Co. v. Hopper*, 64 Fed. 553, 12 C. C. A. 293 (9th Cir.).

of entry is not conclusive as against a transferee who had no notice and no opportunity to be heard upon the question of the original validity of the entry. While the transferee cannot use the entry certificate as *prime facie* evidence of the validity of the entry or of his subsequent claim, he is left free to prove the validity of the entry by any means other than the certificate.¹⁴ A false averment in an entryman's affidavit is punishable as perjury.¹⁵ The oath is false and constitutes perjury where the applicant has made an agreement to sell the land, whether written or oral; its enforceability being immaterial.¹⁶ It is necessary to allege that the act of false swearing was willfully done.¹⁷ False swearing either in the preliminary statement or in depositions required by the land department regulations constitutes perjury.¹⁸ Subornation of perjury cannot be based on a charge that the defendant induced an applicant to swear falsely in his initial statement that he had personally examined the land and stated that it was unfit for cultivation.¹⁹ The grazing of live stock on a national forest reservation without a permit, in violation of regulations promulgated under this act, is punishable as a criminal offense.²⁰

§ 1192. Violation of Rules for Protection of Forest Reserves.

Section 1 of the Act of June 4, 1897, c. 2, 30 Stat. 35, is as follows:

The (Secretary of the Interior) shall make provisions for the protection against destruction by fire and depredations upon the public forests and forest reservations which may have been set aside or which may be hereafter set aside under the said Act of March third, eighteen hundred and

¹⁴ *Thayer v. Spratt*, 189 U. S. 346, 47 L. ed. 845, 23 S. C. 576, following *Hawley v. Diller*, 178 U. S. 476, 44 L. ed. 1157, 20 S. C. 986; *Guaranty Sav. Bank v. Bladow*, 176 U. S. 448, 44 L. ed. 540, 20 S. C. 425.

¹⁵ *Nickell v. United States*, 161 Fed. 702, 88 C. C. A. 562 (9th Cir.).

¹⁶ *Boren v. United States*, 144 Fed. 801, 75 C. C. A. 531 (9th Cir.).

¹⁷ *United States v. Eddy*, 134 Fed. 114.

¹⁸ *Van Gesner v. United States*, 153 Fed. 46, 82 C. C. A. 180 (9th Cir.).

¹⁹ *Robnett v. United States*, 169 Fed. 778, 95 C. C. A. 244 (9th Cir.).

²⁰ *United States v. Grimand*, 220 U. S. 506, 55 L. ed. 563, 31 S. C. 480; *Shannon v. United States*, 160 Fed. 870, 88 C. C. A. 52 (9th Cir.); *United States v. Bale*, 156 Fed. 687; *United States v. De Guirro*, 152 Fed. 568; *United States v. Domingo*, 152 Fed. 566.

ninety-one, and which may be continued ; and he may make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction ; and any violation of the provisions of this Act or such rules and regulation shall be punished as is provided for in the Act of June fourth, eighteen hundred and eighty-eight, amending section fifty-three hundred and eighty-eight of the Revised Statutes of the United States.

It is improper to purposely exclude from any grand or petit jury members of the wage earning class.¹ The written motion to quash, although verified, cannot be considered in evidence without the consent of the prosecutor, but evidence must be offered in support of the motion.² A conviction under an indictment failing to state a crime under the laws of the United States will be reversed, although not challenged in the Court below.³

§ 1192. ¹ *Mamax v. United States*, 264 Fed. 816, — C. C. A. — (6th Cir.).

² *Sonnenberg v. United States*, 264 Fed. 327, — C. C. A. — (9th Circ.).

³ *Mamax v. United States*, *supra*, and cases cited in opinion.

CHAPTER LXX

OBSTRUCTIONS AND INTRUSIONS

- § 1193. Unlawful Intrusion on Sanitarium Reserve.
- § 1194. Making Affidavit for Apprehension of Person as Insane without Probable Cause, or Making False Certificate.
- § 1195. Injury to River or Harbor Improvements.
- § 1196. Obstruction of Navigable Waters, etc.
- § 1197. Obstructing Navigable Waters — Continuance of Obstruction.
- § 1198. Violation of Act, Removal of Structures, etc.

§ 1193. Unlawful Intrusion on Sanitarium Reserve.

Section 4 of the Act of March 22, 1906, c. 1127, 34 Stat. 83, is as follows :

All persons who shall unlawfully intrude upon said reserve, or who shall without permission appropriate any object therein or commit unauthorized injury or waste in any form whatever upon the lands or other public property therein, or who shall violate any of the rules and regulations prescribed hereunder, shall, upon conviction, be fined in a sum not more than one thousand dollars, or be imprisoned for a period not more than twelve months, or shall suffer both fine and imprisonment, in the discretion of the court.

§ 1194. Making Affidavit for Apprehension of Person as Insane without Probable Cause, or Making False Certificate.

Section 6 of the Act of April 27, 1904, c. 1618, 33 Stat. 318, provides as follows :

Any person who makes an affidavit, as required by section one or two of this Act, by which he or she secures or attempts to secure the apprehension, detention, or restraint of any other person in the District of Columbia without prob-

able cause for believing such person to be insane or of unsound mind, or any physician who knowingly makes any false certificate as to the sanity or insanity of any other person shall, upon conviction thereof, be fined not more than five hundred dollars or imprisoned not more than three years, or both.

§ 1195. Injury to River or Harbor Improvements.

Section 3 of the Act of Aug. 41, 1876, c. 267, 19 Stat. 139, provides that

Any person who shall willfully and unlawfully injure any pier, breakwater, or other work of the United States for the improvement of rivers or harbors, or navigation in the United States, shall, on conviction thereof, be punished by a fine not exceeding one thousand dollars.

§ 1196. Obstruction of Navigable Waters, etc.

Section 10 of the Act of March 3, 1899, c. 425, 30 Stat. 1151, is as follows:

The creation of any obstruction, not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of War; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War prior to beginning the same.

The acquittal of a defendant indicted under Section 12 of said act¹ for creating an obstruction in a navigable stream in violation

§ 1196. ¹ See *infra*, § 1197.

of this section, is not a bar to a subsequent suit in equity brought by the United States under Section 12 against the same defendant to compel the removal of the obstruction; the issues and measure of proof required in the two proceedings not being the same.²

§ 1197. Obstructing Navigable Waters — Continuance of Obstruction.

Section 10 of the Act of Sept. 19, 1890, c. 907, 26 Stat. 454, is as follows:

The creation of any obstruction, not affirmatively authorized by law, to the navigable capacity of any waters, in respect of which the United States has jurisdiction, is hereby prohibited. The continuance of any such obstruction, except bridges, piers, docks and wharves, and similar structures erected for business purposes, whether heretofore or hereafter created, shall constitute an offense and each week's continuance of any such obstruction shall be deemed a separate offense. Every person and every corporation which shall be guilty of creating or continuing any such unlawful obstruction in this act mentioned, or who shall violate the provisions of the last four preceding sections of this act, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding five thousand dollars, or by imprisonment (in the case of a natural person) not exceeding one year, or by both such punishments, in the discretion of the court, the creating or continuing of any unlawful obstruction in this act mentioned may be prevented and such obstruction may be caused to be removed by the injunction of any circuit court exercising jurisdiction in any district in which such obstruction may be threatened or may exist; and proper proceedings in equity to this end may be instituted under the direction of the Attorney-General of the United States.

§ 1198. Violation of Act, Removal of Structures, etc.

Section 12 of the Act of March 3, 1899, c. 425, 30 Stat. 1151, as amended Feb. 20, 1900, c. 23, 31 Stat. 32, is as follows:

Every person and every corporation that shall violate any of the provisions of sections nine, ten, and eleven of

² United States v. Donaldson- 403 (4th Cir.), reversing 142 Fed. Shultz Co., 148 Fed. 581, 79 C. C. A. 300.

this Act, or any rule or regulation made by the Secretary of War in pursuance of the provisions of the said section eleven, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding twenty-five hundred dollars nor less than five hundred dollars, or by imprisonment (in the case of a natural person) not exceeding one year, or by both such punishments, in the discretion of the court. And further, the removal of any structures or parts of structures erected in violation of the provisions of the said sections may be enforced by the injunction of any (circuit) court exercising jurisdiction in any district in which such structures may exist, and proper proceedings to this end may be instituted under the direction of the Attorney-General of the United States.

CHAPTER LXXI

RADIOGRAPHS

§ 1199. Radiotelegraph Regulations — Violations — Licenses for Experiments, etc.

§ 1200. License for Operation of Radiotelegraphs. — Punishment.

§ 1199. Radiotelegraph Regulations — Violations — Licenses for Experiments, etc.

Section 4 of the Act of Aug. 13, 1912, c. 287, 37 Stat. 304, provides as follows :

For the purpose of preventing or minimizing interference with communications between stations in which such apparatus is operated, to facilitate radio communication, and to further the prompt receipt of distress signals, said private and commercial stations shall be subject to the regulations of the section. These regulations shall be enforced by the Secretary of Commerce (and Labor) through the collectors of customs and other officers of the Government as other regulations herein provided for. The Secretary of Commerce (and Labor) may, in his discretion, waive the provisions of any or all of these regulations when no interference of the character above mentioned can ensue. The Secretary of Commerce (and Labor) may grant special temporary licenses to stations actually engaged in conducting experiments for the development of the science of radio communication, or the apparatus pertaining thereto, to carry on special tests, using any amount of power or any wave lengths, at such hours and under such conditions as will insure the least interference with the sending or receipt of commercial or Government radiograms, of distress signals and radiograms, or with the work of other stations. In these regulations the naval and military stations shall be understood to be stations

on land. **Regulations. (Normal Wave Length.)** First. Every station shall be required to designate a certain definite wave length as the normal sending and receiving wave length of the station. This wave length shall not exceed six hundred meters or it shall exceed one thousand six hundred meters. Every coastal station open to general public service shall at all times be ready to receive messages of such wave lengths as are required by the Berlin convention. Every ship station, except as hereinafter provided, and every coast station open to general public service shall be prepared to use two sending wave lengths, one of three hundred meters and one of six hundred meters, as required by the international convention in force: Provided, That the Secretary of Commerce (and Labor) may, in his discretion, change the limit of wave length reservation made by regulations first and second to accord with any international agreement to which the United States is a party. **(Other Wave Lengths.)** Second. In addition to the normal sending wave length all stations, except as provided hereinafter in these regulations, may use other sending wave lengths: Provided, That they do not exceed six hundred meters or that they do exceed one thousand six hundred meters: Provided further, That the character of the waves emitted conforms to the requirements of regulations third and fourth following. **(Use of a "Pure Wave.")** Third. At all stations if the sending apparatus, to be referred to hereinafter as the "transmitter", is of such a character that the energy is radiated in two or more wave lengths, more or less sharply defined, as indicated by a sensitive wave meter, the energy in no one of the lesser waves shall exceed ten per centum of that in the greatest. **(Use of a "Sharp Wave.")** Fourth. At all stations the logarithmic decrement per complete oscillation in the wave trains emitted by the transmitter shall not exceed two-tenths, except when sending distress signals or signals and messages relating thereto. **(Use of "Standard Distress Wave.")** Fifth. Every station on shipboard shall be prepared to send distress calls on the normal wave length designated by the international convention in force, except on vessels of small tonnage unable to have plants insuring that wave

length. (**Signal of Distress.**) Sixth. The distress call used shall be the international signal of distress . . . - - - (**Use of "Broad Interfering Wave" for Distress Signals.**) Seventh. When sending distress signals, the transmitter of a station on shipboard may be tuned in such a manner as to create a maximum of interference with a maximum of radiation. (**Distance Requirement for Distress Signals.**) Eighth. Every station on shipboard, wherever practicable, shall be prepared to send distress signals of the character specified in regulations fifth and sixth with sufficient power to enable them to be received by day over sea a distance of one hundred nautical miles by a shipboard station equipped with apparatus for both sending and receiving equal in all essential particulars to that of the station first mentioned. (**"Right of Way" for Distress Signals.**) Ninth. All stations are required to give absolute priority to signals and radiograms relating to ships in distress; to cease all sending on hearing a distress signal; and, except when engaged in answering or aiding the ship in distress, to refrain from sending until all signals and radiograms relating thereto are completed. (**Reduced Power for Ships Near a Government Station.**) Tenth. No station on shipboard, when within fifteen nautical miles of a naval or military station, shall use a transformer input exceeding one kilowatt, nor, when within five nautical miles of such a station, a transformer input exceeding one-half kilowatt, except for sending signals of distress, or signals or radiograms relating thereto. (**Intercommunication.**) Eleventh. Each shore station open to general public service between the coast and vessels at sea shall be bound to exchange radiograms with any similar shore station and with any ship station without distinction of the radio systems adopted by such stations, respectively, and each station on shipboard shall be bound to exchange radiograms with any other station on shipboard without distinction of the radio systems adopted by each station, respectively. It shall be the duty of each such shore station, during the hours it is in operation, to listen in at intervals of not less than fifteen minutes and for a period not less than two minutes, with the receiver tuned to receive

messages of three hundred meter wave lengths. (**Division of Time.**) Twelfth. At important seaports and at all other places where naval or military and private or commercial shore stations operate in such close proximity that interference with the work of naval and military stations cannot be avoided by the enforcement of the regulations contained in the foregoing regulations concerning wave lengths and character of signals emitted, such private or commercial shore stations as do interfere with the reception of signals by the naval and military stations concerned shall not use their transmitters during the first fifteen minutes of each hour, local standard time. The Secretary of Commerce (and Labor) may, on the recommendation of the department concerned, designate the station or stations which may be required to observe this division of time. (**Government Stations to Observe Divisions of Time.**) Thirteenth. The naval or military stations for which the above-mentioned division of time may be established shall transmit signals or radiograms only during the first fifteen minutes of each hour, local standard time, except in case of signals or radiograms relating to vessels in distress, as hereinbefore provided. (**Use of Unnecessary Power.**) Fourteenth. In all circumstances, except in case of signals or radiograms relating to vessels in distress, all stations shall use the minimum amount of energy necessary to carry out any communication desired. (**General Restrictions on Private Stations.**) Fifteenth. No private or commercial station not engaged in the transaction of bona fide commercial business by radio communication or in experimentation in connection with the development and manufacture of radio apparatus for commercial purposes shall use a transmitting wave length exceeding two hundred meters, or a transformer input exceeding one kilowatt, except by special authority of the Secretary of Commerce (and Labor) contained in the license of the station: Provided, That the owner or operator of a station of the character mentioned in this regulation shall not be liable for a violation of the requirements of the third or fourth regulations to the penalties of one hundred dollars or twenty-five dollars, respectively, provided in this section

unless the person maintaining or operating such station shall have been notified in writing that the said transmitter has been found, upon tests conducted by the Government, to be so adjusted as to violate the said third and fourth regulations, and opportunity has been given to said owner or operator to adjust said transmitter in conformity with said regulations. (**Special Restrictions in the Vicinities of Government Stations.**) Sixteenth. No station of the character mentioned in regulation fifteenth situated within five nautical miles of a naval or military station shall use a transmitting wave length exceeding two hundred meters or a transformer input exceeding one-half kilowatt. (**Ship Stations to Communicate with Nearest Shore Stations.**) Seventeenth. In general, the shipboard stations shall transmit their radiograms to the nearest shore station. A sender on board a vessel shall, however, have the right to designate the shore station through which he desires to have his radiograms transmitted. If this cannot be done, the wishes of the sender are to be complied with only if the transmission can be effected without interfering with the service of other stations. (**Limitations for Future Installations in Vicinities of Government Stations.**) Eighteenth. No station on shore not in actual operation at the date of the passage of this Act shall be licensed for the transaction of commercial business by radio communication within fifteen nautical miles of the following naval or military stations, to wit: Arlington, Virginia; Key West, Florida; San Juan, Porto Rico; North Head and Tatoosh Island, Washington; San Diego, California; and those established or which may be established in Alaska and in the Canal Zone; and the head of the department having control of such Government stations shall, so far as is consistent with the transaction of governmental business, arrange for the transmission and receipt of commercial radiograms under the provisions of the Berlin convention of nineteen hundred and six and future international conventions or treaties to which the United States may be a party, at each of the stations above referred to, and shall fix the rates therefor, subject to control of such rates by Con-

gress. At such stations and wherever and whenever shore stations open for general public business between the coast and vessels at sea under the provisions of the Berlin convention of nineteen hundred and six and future international conventions and treaties to which the United States may be a party shall not be so established as to insure a constant service day and night without interruption, and in all localities wherever or whenever such service shall not be maintained by a commercial shore station within one hundred nautical miles of a naval radio station, the Secretary of the Navy shall, so far as is consistent with the transaction of governmental business, open naval radio stations to the general public business described above, and shall fix rates for such service, subject to control of such rates by Congress. The receipts from such radiograms shall be covered into the Treasury as miscellaneous receipts. (**Secrecy of Messages.**) Nineteenth. No person or persons engaged in or having knowledge of the operation of any station or stations shall divulge or publish the contents of any messages transmitted or received by such stations, except to the person or persons to whom the same may be directed, or their authorized agent, or to another station employed to forward such message to its destination, unless legally required so to do by the court of competent jurisdiction or other competent authority. Any person guilty of divulging or publishing any message, except as herein provided, shall, on conviction thereof, be punishable by a fine of not more than two hundred and fifty dollars or imprisonment for a period of not exceeding three months, or both fine and imprisonment, in the discretion of the court. (**Penalties.**) For violation of any of these regulations, subject to which a license under sections one and two of this Act may be issued, the owner of the apparatus shall be liable to a penalty of one hundred dollars, which may be reduced or remitted by the Secretary of Commerce (and Labor), and for repeated violations of any of such regulations, the license may be revoked. For violation of any of these regulations, except as provided in regulation nineteenth, subject to which a license under section three of this Act may be issued, the operator shall be subject to a penalty of twenty-five dollars, which may be reduced or

remitted by the Secretary of Commerce (and Labor), and for repeated violations of any such regulations, the license shall be suspended or revoked.

§ 1200. License for Operation of Radiotelegraphs.

Section 1 of the Act of Aug. 13, 1912, c. 287, 37 Stat. 302, provides as follows :

A person, company, or corporation within the jurisdiction of the United States shall not use or operate any apparatus for radio communication as a means of commercial intercourse among the several States, or with foreign nations, or upon any vessel of the United States engaged in interstate or foreign commerce, or for the transmission of radiograms or signals the effect of which extends beyond the jurisdiction of the State or Territory in which the same are made, or where interference would be caused thereby with the receipt of messages or signals from beyond the jurisdiction of the said State or Territory, except under and in accordance with a license, revocable for cause, in that behalf granted by the Secretary of Commerce (and Labor) upon application therefor ; but nothing in this Act shall be construed to apply to the transmission and exchange of radiograms or signals between points situated in the same State : Provided, That the effect thereof shall not extend beyond the jurisdiction of the said state or interfere with the reception of radiograms or signals from beyond said jurisdiction ; and a license shall not be required for the transmission or exchange of radiograms or signals by or on behalf of the Government of the United States, but every Government station on land or sea shall have special call letters designated and published in the list of radio stations of the United States by the Department of Commerce (and Labor). Any person, company, or corporation that shall use or operate any apparatus for radio communication in violation of this section, or knowingly aid or abet another person, company, or corporation in so doing, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding five hundred dollars, and the apparatus or device so unlawfully used and operated may be adjudged forfeited to the United States.

CHAPTER LXXII

PENSION LAWS

- § 1201. Compensation of Pension Agent or Attorney.
- § 1202. Prosecuting Claims for Arrears.
- § 1203. Pension Agent or Attorney Demanding More than Legal Fee.
- § 1204. Forgery of Indorsement of Pension Check.
- § 1205. Pension Agent's or Attorney's Fees for Increase and in Claims under Special Acts.
- § 1206. Fees of Attorneys for Prosecuting Pension Claims — Penalty for Withholding Pension Money.

§ 1201. Compensation of Pension Agent or Attorney.

Section 4785 of the Revised Statutes, as amended July 4, 1884, c. 181, Sec. 3, 23 Stat. 99 provides as follows:

No agent or attorney or other person shall demand or receive any other compensation for his services in prosecuting a claim for pension or bounty land than such as the Commissioner of Pensions shall direct to be paid to him, not exceeding twenty-five dollars; nor shall such agent, attorney or other person demand or receive such compensation, in whole or in part, until such pension or bounty-land claim shall be allowed: Provided, That in all claims allowed since June twentieth, eighteen hundred and seventy-eight, where it shall appear to the satisfaction of the Commissioner of Pensions that the fee of ten dollars, or any part thereof, has not been paid, he shall cause the same to be deducted from the pension, and the pension agent to pay the same to the recognized attorney.

The provision does not apply to claims for reimbursement. Congress has the power to regulate the amounts pension claimants may contract to pay their agents,¹ even though both parties are

§ 1201. ¹ United States v. Nicewonger, 20 Fed. 438.

citizens of the same state.² By no sort of contrivance or device, either under the disguise of a loan or the purchase of property, or a gift, or any other scheme, can the agent demand or receive or retain any more than the fee allowed by law.³

§ 1202. Prosecuting Claims for Arrears.

Section 4 of the Act of Jan. 25, 1879, c. 23, 20 Stat. 265, provides that:

No claim agent or other person shall be entitled to receive any compensation for services in making application for arrears of pension.

§ 1203. Pension Agent or Attorney Demanding More than Legal Fee.

Section 5485 of the Revised Statutes provides:

Any agent or attorney, or any other person instrumental in prosecuting any claim for pension or bounty land, who shall directly or indirectly contract for, demand, or receive or retain any greater compensation for his services, or instrumentality in prosecuting a claim for pension or bounty land than is provided in the Title pertaining to pensions, or who shall wrongfully withhold from a pensioner or claimant the whole or any part of the pension or claim allowed and due such pensioner or claimant, or the land-warrant issued to any such claimant, shall be deemed guilty of a high misdemeanor, and, upon conviction thereof, shall for every such offense be fined not exceeding five hundred dollars, or imprisonment at hard labor not exceeding two years, or both, at the discretion of the court.

The statute is constitutional.¹ "No man has any claim to this money as a matter of right — no pensioner. It is paid to every pensioner as a bounty from the government. Every man,

² United States v. Van Leuven, 62 Fed. 52.

³ United States v. Moyers, 15 Fed. 411, 416. See *passim* United States v. Wilson, 29 Fed. 286; United States v. Jessup, 15 Fed. 790, 791.

§ 1203. ¹ Frisbie v. United States,

157 U. S. 160, 39 L. ed. 651, 15 S. C. 586; United States v. Van Leuven, 62 Fed. 52; United States v. Moyers, 15 Fed. 411, 417; United States v. Fairchilds, 1 Abb. (U. S.) 74, Fed. Cas. No. 15067.

as a matter of duty, owes his services as a soldier to the government, and thousands of men render those services and never receive any compensation except while a soldier; but the government has allowed and does allow these pensions and these rewards to the soldiers themselves while they are disabled, and to those who are dependent on them when they are deceased. Then it is not a right; it is a bounty; and if the government chooses to say that the money shall go absolutely to the pensioner, irrespective of the claims of any creditor or any one else, it has a right to say so; and there is no doubt that such is the policy of the legislation, and that this is the spirit in which it has been administered by both the state and federal courts.”² The statute, being a penal one, must be construed strictly. The defendant is entitled to the benefit of all doubts.³ Neither fraud nor extortion is an element of the offense. It is completed by the demand or receipt of an illegal fee.⁴ It is a violation of the section to contract to render services in prosecuting a pension claim for more than the legal fee; to demand more than that sum for such services after rendering them without a contract; to retain more than that sum out of the check sent to the pensioner; to receive more than that sum for such services in pursuance of any agreement, direct or indirect, express or implied, or of any legal or moral obligation; but it is not a violation of the section to receive more than the legal fee for such services wholly as a gratuity and without demand.⁵ The section is not confined to the withholding of the money actually collected by the agent, but extends to withholding, against the pensioner’s will, the check or treasury warrant coming into his hands; it is intended to protect the pensioner against frauds until the unconditional payment of the money to him.⁶ The collection by a pension agent or attorney of the pension money, and by the consent and at the request of the pensioner, his retention, in good faith, of enough of the money in his hands to pay certain debts due by the pensioner to other

² *United States v. Moyers*, 15 Fed. 411, 417.

³ *United States v. Hewitt*, 11 Fed. 243; *United States v. Starn*, 17 Fed. 435; *United States v. Snow*, 2 Flipp. 1, Fed. Cas. No. 16350.

⁴ *United States v. Moore*, 18 Fed. 686.

⁵ *United States v. Brown*, 40 Fed. 457.

⁶ *United States v. Ryckman*, 12 Fed. 46.

parties, and also of \$200 for his professional services rendered for the pensioner in other matters not connected with the procurement of the pension money, was not a retention of pension money contemplated by the statute.⁷ After a pensioner has received his pension money he may do as he pleases with it, except that he cannot, either directly or indirectly by any device in the way of loan or gift, mortgage, or other dealing, pay for services rendered in the pension case more than the legal fee.⁸ The language of the act is limited to "services." This does not include actual expenses; hence, an agent, attorney or other person aiding a pensioner may be reimbursed money which he may have advanced to or for him, and may also be repaid actual expenses incurred in prosecuting his pension claim.⁹ The act does not apply to a claim under Rev. Stat. § 4718, for reimbursement out of an accrued pension by one who bore the expenses of the last sickness and burial of a deceased pensioner, nor to the agent or attorney of such claimant.¹⁰ "It is not very easy to define for all purposes what constitutes under the statute a withholding of the pension. It cannot commence, of course, until the money is received by the party charged. Nor can it commence then, unless there is a duty of immediate payment to the pensioner. A reasonable time must certainly be allowed for this. What that is must depend in each case on its own circumstances. A refusal to pay on demand without just excuse would constitute withholding at once. Such delay as would show an intention to evade payment would constitute a withholding. If there is nothing but careless delay, the party might hold the money for some time without incurring this severe penalty of two years' imprisonment. In short, there must be some unreasonable delay, some refusal to pay on demand, or some such intent to keep the money wrongfully from the pensioner, as would constitute an unlawful withholding in the meaning of the law."¹¹ The word "withholding" has a definite significance, and con-

⁷ *United States v. Hewitt*, 11 Fed. 243.

⁸ *United States v. Moore*, 18 Fed. 686; *United States v. Brown*, 40 Fed. 457.

⁹ *United States v. Moore*, 18 Fed. 686.

¹⁰ *United States v. Nicewonger*, 20 Fed. 438.

¹¹ *United States v. Irvine*, 98 U. S. 450, 451, 25 L. ed. 193.

templates, as used in the statute, not the fraudulent obtaining of money from a pensioner, but the withholding of the money before it reaches the hands of the pensioner and passes under his dominion and absolute control. The penalty is imposed for the wrongful withholding of the whole or any part of the pension claim allowed and due each pensioner, and not for a wrongful obtaining of the same.¹² The section does not apply to a case where the money had been withheld before the passage of the act. Arrearages of pay are not collected under any pension law, and are therefore not within the act. Withholding pay and bounty which are not mentioned in the act are not intended to be punished thereby.¹³ "The fact that the offense of withholding is limited to any agent or attorney or other person instrumental in prosecuting any claim for pension demonstrates that Congress intended to legislate merely against the wrongful withholding by certain individuals, who, by reason of their relation to the pensioner and his claim, might lawfully obtain possession of the same from the government, and upon whom rested the duty of paying it over to the pensioner."¹⁴ At the request of an illiterate pensioner, an attorney filled out the vouchers necessary to obtain the first payment, forwarded them to the proper pension agent, received and procured the pensioner's indorsement on the agent's check, and cashed it, withholding \$10. It was held that although he had no hand in procuring the allowance of the pension he was instrumental in prosecuting the claim within the section.¹⁵ To be liable under this section the defendant need not be the claimant's regular attorney, recognized as such at the pension office. It is sufficient if he be an "agent, or attorney or any other person."¹⁶ The section seems to declare that no person who has this connection with the prosecution of a claim shall be permitted unlawfully to withhold money from the pensioner.¹⁷ An indictment need

¹² *Ballew v. United States*, 160 U. S. 187, 194, 40 L. ed. 388, 16 S. C. 263.

¹³ *United States v. Benecke*, 98 U. S. 447, 25 L. ed. 192.

¹⁴ *Ballew v. United States*, *supra*.

¹⁵ *United States v. Reynolds*, 48 Fed. 721.

¹⁶ *United States v. Schindler*, 10 Fed. 547; *Frisbie v. United States*, 157 U. S. 160, 39 L. ed. 657, 15 S. C. 586; *United States v. Moyers*, 15 Fed. 411.

¹⁷ *United States v. Connally*, 1 Fed. 779, 780.

not state in what capacity the defendant was instrumental in getting the claim.¹⁸ Parol evidence that the person from whom the defendant withholds the money is a pensioner is not admissible, nor are the entries in the local pension agent's books, copied from the pensioner's certificate. The best evidence is the record of the proceeding as it rests in the interior department, and its adjudication thereon. Nor is it competent to prove by parol that the checks received by the government's witness were for pensions due to her.¹⁹ Where the commissioner of pensions has passed upon the claim, and found the claimant to be entitled to the pension, and has directed it to be paid, such finding is conclusive as to the claimant's rights.²⁰ Whenever the act or series of acts necessary to constitute a criminal withholding of the money have transpired, the crime is complete, and from that day the Statute of Limitations begins to run against the prosecution.²¹ It would be inadmissible, in dealing with the criminal provisions of the section, to extend them by construction to future acts of Congress, when by the express words of the section its provisions are confined to the then existing pension law.²² The penalty provided by this section is applicable to the act of June 20, 1878,²³ *i.e.*, the demanding or receiving for services in a pension case a greater sum than ten dollars.²⁴ The act of June 20, 1878 (20 Stat. 243), entitled "An act relating to claim agents and attorneys in pension cases", does not impliedly repeal the provisions of this section, which apply to violations of that act.²⁵ Section 4766, Revised Statutes, declaring that "hereafter no pension shall be paid to any person other than the pensioner entitled thereto" does not conflict with this section.²⁶ The cases cited in the notes show the effect of the repeal of prior acts.²⁷

¹⁸ *United States v. Reynolds*, *supra*; *United States v. Koch*, 21 Fed. 873; *United States v. Wilson*, 29 Fed. 286. *See also* *United States v. Mason*, 8 Fed. 412; *United States v. Benecke*, *supra*.

¹⁹ *United States v. Scott*, 25 Fed. 470.

²⁰ *United States v. Schindler*, *supra*.

²¹ *United States v. Irvine*, 98 U.S. 450, 25 L. ed. 193.

²² *United States v. Jenson*, 15 Fed. 138.

²³ *United States v. Jessup*, 15 Fed. 790.

²⁴ *United States v. Moore*, 18 Fed. 686.

²⁵ *United States v. Dowdell*, 8 Fed. 881.

²⁶ *United States v. Connally*, 1 Fed. 779.

²⁷ *United States v. Goodwin*, 20

§ 1204. Forgery of Indorsement of Pension Check.

Section 4 of the Act of Aug. 17, 1912, c. 301, 37 Stat. 313, provides as follows :

Whoever shall forge the indorsement of the person to whose order any pension check shall be drawn, or whoever with the knowledge that such indorsement is forged shall utter such check, or whoever, by falsely personating such person, shall receive from any person, firm, corporation, or officer or employee of the United States the whole or any portion of the amount represented by such check, shall upon conviction be punished by a fine of not more than one thousand dollars or be imprisoned not more than five years or both.

§ 1205. Pension Agent's or Attorney's Fees for Increase and in Claims under Special Acts.

The Act of March 3, 1891, c. 548, 26 Stat. 1082, provides as follows :

Hereafter no agent or attorney shall demand, receive, or be allowed any compensation under existing law exceeding two dollars in any claim for increase of pension on account of the increase of the disability for which the pension has been allowed, or for services rendered in securing the passage of any special act of Congress granting a pension or an increase of pension in any case that has been presented at the Pension Office or is allowable under the general pension laws : And provided further, That any agent, attorney, or other person instrumental in prosecuting any claim for increase of pension on account of the increase of disability for which pension was allowed, or who has rendered services in procuring the passage of any special act of Congress granting a pension or an increase of pension in any case that has been presented at the Pension Office or is allowable under the general pension laws, who shall

Fed. 237; United States *v.* Moore, 18 Fed. 686; United States *v.* Jessup, 15 Fed. 790; United States *v.* Jenson, 15 Fed. 138; United States *v.* Starn, 17 Fed. 435; United States *v.* Van Vliet, 23 Fed. 35; United States *v.* Hague, 22 Fed. 706; United States *v.* Mathews, 23 Fed. 74; United States *v.* Mason, 8 Fed. 412; United States *v.* Webster, 21 Fed. 187. .

directly or indirectly contract for, demand, receive, or retain any compensation for such services, except as hereinbefore provided, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall, for each and every such offense, be fined not exceeding five hundred dollars or imprisoned not exceeding two years, or both, in the discretion of the court: Provided, however, That the foregoing provisions in relation to fees of agents or attorneys shall not apply to any case now pending where there is an existing lawful contract express or implied.

§ 1206. Fees of Attorneys for Prosecuting Pension Claims — Penalty for Withholding Pension Money.

Section 4 of the Act of June 27, 1890, c. 634, 26 Stat. 183 reads as follows:

No agent, attorney, or other person engaged in preparing, presenting, or prosecuting any claim under the provisions of this act shall, directly or indirectly, contract for, demand, receive, or retain for such services in preparing, presenting, or prosecuting such claim a sum greater than ten dollars, which sum shall be payable only upon the order of the Commissioner of Pensions, by the pension agent making payment of the Pension allowed, and any person who shall violate any of the provisions of this section, or who shall wrongfully withhold from a pensioner or claimant the whole or any part of a pension or claim allowed or due such pensioner or claimant under this act, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall, for each and every such offense, be fined not exceeding five hundred dollars, or be imprisoned at hard labor not exceeding two years, or both, in the discretion of the court.

The section is constitutional. An indictment for its violation which describes the defendant as a lawyer is sufficient. The offense is committed when a greater sum than \$10 is taken, and it is immaterial whether the pension money has or has not been received. When the amount of the excess so taken is unknown to the grand jury, it is proper to allege that fact in the indictment. It is unnecessary to allege a demand for the return of the money

wrongfully taken.¹ After the pensioner has received the pension money he may lend the agent money or buy property of him, paying him therefor, whether it be with pension money or any other money, if it be a transaction made in good faith and not a device to evade the statute. But under any such device, no matter what form it takes, if this be the object, the statute is violated.²

§ 1206. ¹ *Frisbie v. United States*, 157 U. S. 160, 39 L. ed. 657, 15 S. C. Fed. 411, 417. ² *United States v. Moyers*, 15 585.

CHAPTER LXXIII

EIGHT-HOUR LAW

§ 1207. Violations of Eight-hour Workday Law.

§ 1208. Commission to Investigate and Report.

§ 1209. Penalty for Violation of Act.

§ 1210. Eight-hour day on Public Works.

§ 1211. Perjury under Federal Employers' Liability Act.

§ 1207. Violations of Eight-hour Workday Law.

Section 1 of the Act of Sept. 3, 5, 1916, c. 436, 39 Stat. 721 provides:

That beginning January first, nineteen hundred and seventeen, eight hours shall, in contracts for labor and service, be deemed a day's work and the measure or standard of a day's work for the purpose of reckoning the compensation for services of all employees who are now or may hereafter be employed by any common carrier by railroad, except railroads independently owned and operated not exceeding one hundred miles in length, electric street railroads, and electric interurban railroads, which is subject to the provisions of the Act of February fourth, eighteen hundred and eighty-seven, entitled "An Act to regulate commerce", as amended, and who are now or may hereafter be actually engaged in any capacity in the operation of trains used for the transportation of persons or property on railroads, except railroads independently owned and operated not exceeding one hundred miles in length, electric street railroads, and electric interurban railroads, from any State or Territory of the United States or the District of Columbia to any other State or Territory of the United States or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States to an adjacent foreign coun-

try, or from any place in the United States through a foreign country to any other place in the United States: *Provided*, That the above exceptions shall not apply to railroads though less than one hundred miles in length whose principal business is leasing or furnishing terminal or transfer facilities to other railroads, or are themselves engaged in transfers of freight between railroads or between railroads and industrial plants.

§ 1208. Commission to Investigate and Report.

Section 2 of the Act provides :

That the President shall appoint a commission of three, which shall observe the operation and effects of the institution of the eight-hour standard workday as above defined and the facts and conditions affecting the relations between such common carriers and employees during a period of not less than six months nor more than nine months, in the discretion of the commission, and within thirty days thereafter such commission shall report its findings to the President and Congress; that each member of the commission created under the provisions of this Act shall receive such compensation as may be fixed by the President. That the sum of \$25,000, or so much thereof as may be necessary, be, and hereby is, appropriated, out of any money in the United States Treasury not otherwise appropriated, for the necessary and proper expenses incurred in connection with the work of such commission, including salaries, per diem, traveling expenses of members and employees, and rent, furniture, office fixtures and supplies, books, salaries, and other necessary expenses, the same to be approved by the chairman of said commission and audited by the proper accounting officers of the Treasury.

§ 1209. Penalty for Violation of Act.

Section 4 provides that :

Any person violating any provision of this Act shall be guilty of a misdemeanor and upon conviction shall he fined not less than \$100 and not more than \$1000, or imprisoned not to exceed one year, or both.

The statute was held to be within the powers of Congress to enact. The Court declined in the particular case to pass on the question whether the provision for penalties is constitutional, as the suit was not one concerning penalties.¹ The act was held to apply only to employees doing work performed by the four railroad labor brotherhoods to prevent whose strike the statute was enacted, that is, all trainmen working on engines and in cars, not to switch tenders in yards of railroads.²

§ 1210. Eight-hour Day on Public Works.

Section 2 of the Act of Aug. 1, 1892, c. 352, 27 Stat. 340, as amended March 3, 1913, c. 106, 37 Stat. 726, provides that :

Any officer or agent of the Government of the United States or of the District of Columbia, or any contractor or subcontractor whose duty it shall be to employ, direct, or control any laborer or mechanic employed upon a public work of the United States or of the District of Columbia, or any person employed to perform services similar to those of laborers and mechanics in connection with dredging or rock excavation in any river or harbor of the United States or of the District of Columbia who shall intentionally violate any provision of this Act, shall be deemed guilty of a misdemeanor, and for each and every such offense shall, upon conviction, be punished by a fine not to exceed one thousand dollars, or by imprisonment for not more than six months, or by both such fine and imprisonment, in the discretion of the court having jurisdiction thereof.

§ 1211. Perjury under Federal Employers' Liability Act.

Section 39 of the Act of Sept. 7, 1916, c. 458, 39 Stat. 749, provides that :

Whoever makes, in any affidavit required under section four or in any claim for compensation, any statement, knowing it to be false, shall be guilty of perjury and shall be punished by a fine of not more than \$2000, or by imprisonment for not more than one year, or by both such fine and imprisonment.

§ 1209. ¹ *Wilson v. New*, 243 U. S. 332, 354, 61 L. ed. 755, 37 S. C. 298. ² *Coke v. Illinois Central R. R. Co.*, 255 Fed. 190.

CHAPTER LXXIV

FAILURE TO TESTIFY

- § 1212. Refusal of Witness to Testify in Congressional Investigations.
- § 1213. Refusal to Appear or Testify at Courts-martial.
- § 1214. Compulsory Self-incrimination Prohibited.
- § 1215. Contested Elections — Failure to Attend or Testify.
- § 1216. Affidavits of Persons in Military or Naval Service in Land Office Hearings.
- § 1217. Disobedience to Subpœnas to Attend Land Office Hearings.
- § 1218. Punishment for Violations of Act.

§ 1212. Refusal of Witness to Testify in Congressional Investigations.

Section 102 of the Revised Statutes reads as follows :

Every person who having been summoned as a witness by the authority of either House of Congress, to give testimony or to produce papers upon any matter under inquiry before either House, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor punishable by a fine of not more than one thousand dollars nor less than one hundred dollars, and imprisonment in a common jail for not less than one month nor more than twelve months.

The section is constitutional. It is not so inseparably connected with Section 103 that it would be invalid if that section were not sustainable. "Any" matter under inquiry refers to matters within the jurisdiction of the two Houses of Congress, before them for consideration and proper for their action; to questions per-

inent thereto; and to facts or papers bearing thereon.¹ An inquiry into various subjects "as a basis for remedial and other legislative purposes", one of the subjects being the relations of national banks in various directions, made before an authorized committee of the House of Representatives, during which a witness refused to give the names of national banks and officers of national banks who participated in a certain syndicate, was within the section, the questions being "pertinent to the question under inquiry" and not invading any constitutional rights of the witness.²

§ 1213. Refusal to Appear or Testify at Courts-martial.

Section 1342 of the Revised Statutes, as amended, Aug. 29, 1916, c. 418, § 3, 39 Stat. 654, provides as follows:

Every person not subject to military law who, being duly subpoenaed to appear as a witness before any military court, commission, court of inquiry, or board, or before any officer, military or civil, designated to take a deposition to be read in evidence before such court, commission, court of inquiry, or board, willfully neglects or refuses to appear, or refuses to qualify as a witness, or to testify, or produce documentary evidence which such person may have been legally subpoenaed to produce, shall be deemed guilty of a misdemeanor, for which such person shall be punished on information in the district court of the United States or in a court of original criminal jurisdiction in any of the Territorial possessions of the United States, jurisdiction being hereby conferred upon such courts for such purpose; and it shall be the duty of the United States district attorney or the officer prosecuting for the Government in any such court of original criminal jurisdiction, on the certification of the facts to him by the military court, commission, court of inquiry, or board, to file an information against and prosecute the person so offending, and the punishment of such person, on conviction, shall be a fine of not more than

§ 1212. ¹ In *re Chapman*, 166 U. S. 661, 41 L. ed. 1154, 17 S. C. 677. See also *Chapman v. United States*, 164 U. S. 436, 41 L. ed. 504, 17 S. C. 76; In *re Chapman*, 156 U. S. 211, 39 L. ed. 401, 15 S. C. 331; *Chapman v. United States*, 5 App. (D. C.) 122.

² *Henry v. Henkel*, 207 Fed. 805.

\$500 or imprisonment not to exceed six months, or both, at the discretion of the court: *Provided*, That the fees of such witness and his mileage, at the rates allowed to witnesses attending the courts of the United States, shall be duly paid or tendered said witness, such amounts to be paid out of the appropriation for the compensation of witnesses.¹

§ 1214. Compulsory Self-incrimination Prohibited.

Section 1342 of the Revised Statutes, as amended Aug. 29, 1916, c. 418, § 3, 39 Stat. 654, provides as follows:

No witness before a military court, commission, court of inquiry, or board, or before any officer, military or civil, designated to take a deposition to be read in evidence before a military court, commission, court of inquiry, or board, shall be compelled to incriminate himself or to answer any questions which may tend to incriminate or degrade him.

§ 1215. Contested Elections — Failure to Attend or Testify.

Section 116 of the Revised Statutes reads as follows:

Any person who, having been summoned in the manner above directed, refuses or neglects to attend and testify, unless prevented by sickness or unavoidable necessity, shall forfeit the sum of twenty dollars, to be recovered, with costs of suit, by the party at whose instance the subpoena was issued, and for his use, by an action of debt, to any court of the United States; and shall also be liable to an indictment for a misdemeanor, and punishment by fine and imprisonment.

An indictment under this section which avers refusal and neglect to attend and testify, but fails to allege special statutory authority for the issue of the subpoena served, and the official who issued it, is insufficient.¹

§ 1216. Affidavits of Persons in Military or Naval Service in Land-office Hearings.

Section 2293 of the Revised Statutes provides that:

In case of any person desirous of availing himself of the benefits of this chapter; but who, by reason of actual service

§ 1213. ¹ See also Act of March 2, 1901, C. 809, § 1, 31 Stat. 950.

§ 1215. ¹ United States v. Cover, 46 Fed. 284.

in the military or naval service of the United States, is unable to do the personal preliminary acts at the district land-office which the preceding sections require; and whose family, or some member thereof, is residing on the land which he desires to enter, and upon which a bona fide improvement and settlement have been made, such person may make the affidavit required by law before the officer commanding in the branch of the service in which the party is engaged, which affidavit shall be as binding in law, and with like penalties, as if taken before the register or receiver; and upon such affidavit being filed with the register by the wife or other representative of the party, the same shall become effective from the date of such filing, provided the application and affidavit are accompanied by the fee and commissions as required by law.¹

Failure of the entryman's affidavit to state that his family or any member thereof was residing on the land does not invalidate the entry.²

§ 1217. Disobedience to Subpoenas to Attend Land-office Hearings.

Section 3 of the Act of Jan. 31, 1903, c. 344, 32 Stat. 790, is as follows:

Any person willfully neglecting or refusing obedience to such subpoena, or neglecting or refusing to appear and testify when subpoenaed, his fees having been paid if demanded, shall be deemed guilty of a misdemeanor, for which he shall be punished by indictment in the district court of the United States or in the district courts of the Territories exercising the jurisdiction of circuit or district courts of the United States. The punishment for such offense, upon conviction, shall be a fine of not more than two hundred dollars, or imprisonment not to exceed ninety days, or both, at the discretion of the court: Provided, That if such witness has been prevented from obeying such subpoena without fault upon his part he shall not be punished under the provisions of this Act.

§ 1216. ¹ See *passim* *Sturr v. Beck*, 133 U. S. 541, 33 L. ed. 761, 10 S. C. 350; *Whitney v. Taylor*, 158 U. S. 85, 39 L. ed. 906, 15 S. C. 796. ² *Hastings and Dakota R. R. Co. v. Whitney*, 132 U. S. 357, 33 L. ed. 363, 10 S. C. 112.

§ 1218. **Punishment for Violations of Act.**

June 25, 1910, c. 392, Sec. 11, 36 Stat. 824, amended Aug. 19, 1911, c. 33, Sec. 2, 37 Stat. 26, Section 10 of the act of 1910 reads as follows:

That every person willfully violating any of the foregoing provisions of this Act shall, upon conviction, be fined not more than one thousand dollars or imprisoned not more than one year, or both.

Witnesses who refuse, without invoking the constitutional protection against incrimination, to obey a *subpœna duces*, or to answer questions propounded to them in a grand jury investigation under this act of corrupt practices in a senatorial primary election cannot, on being committed for contempt, secure release on *habeas corpus* on the ground of unconstitutionality of the Statute.¹

§ 1218. ¹ *Ex parte Blair*, 253 Fed. 800, S. C. *affirmed*, 250 U. S. 273, 63 L. ed. 979, 39 S. C. 468.

CHAPTER LXXV

FOREIGN RELATIONS

- § 1219. Violating Safeconduct or Assaulting Foreign Public Minister.
- § 1220. Process against Such Ministers and Their Domestics.
- § 1221. Penalty for Suing Out or Executing Process.
- § 1222. Citizens or Inhabitants of United States in Service of Foreign Minister.
- § 1223. Taking Testimony for Use in Foreign Countries.
- § 1224. False Statements in Application for Passport and Subsequent Use.
- § 1225. False Making or Forging of Passport.
- § 1226. Powers of Consular Officers to Solemnize Marriages.
- § 1227. Seizure of Arms, etc., Intended for Export in Violation of Law.
- § 1228. Acting as Agent of Foreign Government without Notice to Secretary of State.
- § 1229. Acceptance of Consular Appointment without Bond Constitutes Embezzlement.
- § 1230. Conspiracy within United States to Injure or Destroy Property of Foreign Government.

§ 1219. Violating Safeconduct or Assaulting Foreign Public Minister.

Section 4062 of the Revised Statutes provides that :

Every person who violates any safeconduct or passport duly obtained and issued under authority of the United States ; or who assaults, strikes, wounds, imprisons, or in any other manner offers violence to the person of a public minister, in violation of the law of nations, shall be imprisoned for not more than three years, and fined, at the discretion of the court.¹

An indictment under the Crimes Act of 1790 for an infraction of the law of nations by offering violence to the person of a foreign minister is not a case "affecting ambassadors, other public ministers and consuls" within the Federal Constitution.² A

§ 1219. ¹ United States v. Ortega,
11 Wheat. (U. S.) 467, 6 L. ed. 521.

² Ex parte Cabrera, 1 Wash. (C.
C.) 232, Fed. Cas. No. 2278.

secretary attached to the Spanish Legation is entitled to the protection of the laws of nations against any civil or criminal prosecution. The laws of the United States, which punish those who violate the privileges of a foreign minister, are equally obligatory on the State courts, as upon those of the United States. A certificate by the Secretary of State, under seal of office, that a person has been recognized by the Department of State as a foreign minister is full evidence that he has been authorized and received as such by the President of the United States. A foreign minister cannot waive his privileges or immunities, and his submission or consent to an arrest is no justification.³ So an indictment against the domestic servant of a foreign minister for assault and battery was quashed for want of jurisdiction.⁴

§ 1220. Process against Such Ministers and Their Domestics.
Section 4063 of the Revised Statutes provides that :

Whenever any writ or process is sued out or prosecuted by any person in any court of the United States, or of a State, or by any judge or justice, whereby the person of any public minister of any foreign prince or state, authorized and received as such by the President, or any domestic or domestic servant of any such minister, is arrested or imprisoned, or his goods or chattels are distrained, seized, or attached, such writ or process shall be deemed void.

§ 1221. Penalty for Suing Out or Executing Process.
Section 4064 of the Revised Statutes provides that :

Whenever any writ or process is sued out in violation of the preceding section, every person by whom the same is obtained or prosecuted, whether as party or as attorney or solicitor, and every officer concerned in executing it, shall be deemed a violator of the laws of nations, and a disturber of the public repose, and shall be imprisoned for not more than three years, and fined at the discretion of the court.

An attaché to a foreign legation is a public minister within the act. This section applies to all public ministers. Any person who executes process on a foreign minister is to be deemed an

³ United States v. Benner, Baldw. Cranch (C. C.), 173, Fed. Cas. No. (C. C.) 234, Fed. Cas. No. 14568. 15550.

⁴ United States v. Lafontaine, 4

officer under the act. To support an indictment it is not necessary that the defendant should know the person arrested to be a foreign minister.¹

§ 1222. Citizens or Inhabitants of United States in Service of Foreign Minister.

Section 4065 of the Revised Statutes provides that :

The two preceding sections shall not apply to any case where the person against whom the process is issued is a citizen or inhabitant of the United States, in the service of a public minister, and the process is founded upon a debt contracted before he entered upon such service; nor shall the preceding section apply to any case where the person against whom the process is issued is a domestic servant of a public minister, unless the name of the servant has, before the issuing thereof, been registered in the Department of State, and transmitted by the Secretary of State to the marshal of the District of Columbia, who shall upon receipt thereof post the same in some public place in his office.

Section 4066 of the Revised Statutes provides :

All persons have resort to the list of names so posted in the marshal's office, and may take copies without fee.

§ 1223. Taking Testimony for Use in Foreign Countries.

Section 4071 of the Revised Statutes reads as follows :

The testimony of any witness residing within the United States, to be used in any suit for the recovery of money or property depending in any court in any foreign country with which the United States are at peace, and in which the government of such foreign country shall be a party or shall have an interest, may be obtained, to be used in such suit. If a commission or letters rogatory to take such testimony, together with specific written interrogatories, accompanying the same, and addressed to such witness, shall have been issued from the court in which such suit is pending, on producing the same before the district judge of any district where the witness resides or shall be found, and on due proof being made to such judge that the testimony of any witness is material to the party desiring the same, such

§ 1221. ¹ United States v. Benner, Baldw. (C. C.) 234, Fed. Cas. No. 14568.

judge shall issue a summons to such witness requiring him to appear before the officer or commissioner named in such commission or letters rogatory, to testify in such suit. And no witness shall be compelled to appear or to testify under this section except for the purpose of answering such interrogatories so issued and accompanying such commission or letters: *Provided*, That when counsel for all the parties attend the examination, they may consent that questions in addition to those accompanying the commission or letters rogatory may be put to the witness, unless the commission or letters rogatory exclude such additional interrogatories. The summons shall specify the time and place at which the witness is required to attend, which place shall be within one hundred miles of the place where the witness resides or shall be served with such summons.

Section 4072 of the Revised Statutes provides :

No witness shall be required, on such examination or any other under letters rogatory, to make any disclosure or discovery which shall tend to criminate him either under the laws of the State or Territory within which such examination is had, or any other, or any foreign state.

Section 4073 of the Revised Statutes provides :

If any person shall refuse or neglect to appear at the time and place mentioned in the summons issued, in accordance with section forty hundred and seventy-one, or if upon his appearance he shall refuse to testify, he shall be liable to the same penalties as would be incurred for a like offense on the trial of a suit in the district court of the United States.

Section 4074 of the Revised Statutes provides :

Every witness who shall so appear and testify shall be allowed, and shall receive from the party at whose instance he shall have been summoned, the same fees and mileage as are allowed to witnesses in suits depending in the district courts of the United States.

§ 1224. False Statements in Application for Passport and Subsequent Use.

The Act of June 15, 1917, c. 30, Title IX, § 2, 40 Stat. 227, provides that :

Whoever shall willfully and knowingly make any false statement in an application for passport with intent to induce or secure the issuance of a passport under the authority of the United States, either for his own use or the use of another, contrary to the laws regulating the issuance of passports or the rules prescribed pursuant to such laws, or whoever shall willfully and knowingly use or attempt to use, or furnish to another for use, any passport the issue of which was secured in any way by reason of any false statement, shall be fined not more than \$2000 or imprisoned not more than five years or both.

§ 1225. False Making or Forging of Passport.

Section 4 provides that :

Whoever shall falsely make, forge, counterfeit, mutilate, or alter, or cause or procure to be falsely made, forged, counterfeited, mutilated, or altered any passport or instrument purporting to be a passport, with intent to use the same, or with intent that the same may be used by another ; or whoever shall willfully or knowingly use, or attempt to use, or furnish to another for use any such false, forged, counterfeited, mutilated, or altered passport or instrument purporting to be a passport, or any passport validly issued which has become void by the occurrence of any condition therein prescribed invalidating the same, shall be fined not more than \$2000 or imprisoned not more than five years, or both.

§ 1226. Powers of Consular Officers to Solemnize Marriages.

Section 4082 of the Revised Statutes reads as follows :

Marriages in presence of any consular officer of the United States in a foreign country, between persons who would be authorized to marry if residing in the District of Columbia, shall be valid to all intents and purposes, and shall have the same effect as if solemnized within the United States. And such consular officers shall, in all cases, give to the parties married before them a certificate of such marriage, and shall send another certificate thereof to the Department of State, there to be kept ; such certificates shall specify the names of the parties, their ages, places of birth, and residence.

§ 1227. Seizure of Arms, etc., Intended for Export in Violation of Law.

The Act of June 15, 1917, c. 30, Title VI, § 1, 40 Stat. 223, is as follows :

Whenever an attempt is made to export or ship from or take out of the United States, any arms or munitions of war, or other articles, in violation of law, or whenever there shall be known or probable cause to believe that any such arms or munitions of war, or other articles, are being or are intended to be exported, or shipped from, or taken out of the United States, in violation of law, the several collectors, naval officers, surveyors, inspectors of customs, and marshals, and deputy marshals of the United States, and every other person duly authorized for the purpose by the President, may seize and detain any articles or munitions of war about to be exported or shipped from, or taken out of the United States, in violation of law, and the vessels or vehicles containing the same, and retain possession thereof until released or disposed of as hereinafter directed. If upon due inquiry as hereinafter provided, the property seized shall appear to have been about to be so unlawfully exported, shipped from, or taken out of the United States, the same shall be forfeited to the United States.

The provision of Section 2 of this Act is mandatory, and, if such application is not made within the time limited, the owner is entitled to a return of the property.¹

§ 1228. Acting as Agent of Foreign Government without Notice to Secretary of State.

Section 3 of the Act of June 15, 1917, c. 30, Title VIII, 40 Stat. 226, provides that :

Whoever, other than a diplomatic or consular officer or attaché, shall act in the United States as an agent of a foreign government without prior notification to the Secretary of State shall be fined not more than \$5000, or imprisoned not more than five years, or both.

§ 1227. ¹ United States v. 267 Twenty-Dollar Gold Pieces, 255 Fed. 217.

§ 1229. Acceptance of Consular Appointment without Bond Constitutes Embezzlement.

Section 2 of the Act of June 30, 1902, c. 1331, 32 Stat. 547, provides :

That every consular officer who accepts any appointment to any office of trust mentioned in the preceding section without first having complied with the provisions thereof by due execution of a bond as therein required, or who shall willfully fail or neglect to account for, pay over, and deliver any money, property, or effects so received to any person lawfully entitled thereto, after having been requested by the latter, his representative or agent so to do, shall be deemed guilty of embezzlement and shall be punishable by imprisonment for not more than five years and by a fine of not more than five thousand dollars.

§ 1230. Conspiracy within United States to Injure or Destroy Property of Foreign Government.

Section 5 of the Act of June 15, 1917, c. 30, Title VIII, 40 Stat. 226, reads as follows :

If two or more persons within the jurisdiction of the United States conspire to injure or destroy specific property situated within a foreign country and belonging to a foreign Government or to any political subdivision thereof with which the United States is at peace, or any railroad, canal, bridge, or other public utility so situated, and if one or more such persons commits an act within the jurisdiction of the United States to effect the object of the conspiracy, each of the parties to the conspiracy shall be fined not more than \$5000, or imprisoned not more than three years, or both. Any indictment or information under this section shall describe the specific property which it was the object of the conspiracy to injure or destroy.

CHAPTER LXXVI

OFFENSES IN CONNECTION WITH EMIGRATION

- § 1231. Prepaying Transportation or Assisting Importation of Contract Laborers.
- § 1232. Inducing Immigration by Advertisements of Employment to Aliens.
- § 1233. Solicitation of Immigration by Transportation Companies.
- § 1234. Bringing in, Concealing, or Harboring Aliens not Entitled to Enter.
- § 1235. Landing of Excluded Aliens Employed on Vessels.

§ 1231. Prepaying Transportation or Assisting Importation of Contract Laborers.

Section 5 of the Act of Feb. 5, 1917, c. 29, 39 Stat. 870, provides :

That it shall be unlawful for any person, company, partnership, or corporation, in any manner whatsoever, to prepay the transportation or in any way to induce, assist, encourage, or solicit, or attempt to induce, assist, encourage, or solicit the importation or migration of any contract laborer or contract laborers into the United States, unless such contract laborer or contract laborers are exempted under the fifth proviso of section three of this Act, or have been imported with the permission of the Secretary of Labor in accordance with the fourth proviso of said section, and for every violation of any of the provisions of this section the person, partnership, company, or corporation violating the same shall forfeit and pay for every such offense the sum of \$1000, which may be sued for and recovered by the United States, as debts of like amount are now recovered in the courts of the United States. For every violation of the provisions hereof the person violating the same may be prosecuted in a criminal action for a misdemeanor, and on conviction thereof shall be punished by a fine of \$1000, or by imprisonment for a term of not less than six months nor more than two years; and under

either the civil or the criminal procedure mentioned separate suits or prosecutions may be brought for each alien thus offered or promised employment as aforesaid. The Department of Justice, with the approval of the Department of Labor, may from any fines or penalties received pay rewards to persons other than Government employees who may furnish information leading to the recovery of any such penalties, or to the arrest and punishment of any person, as in this section provided.

The section (5) should be strictly construed. Under Sections 4 and 5 an actual migration or entry into the territory of the United States is necessary to warrant recovery of the penalty, and where the laborers were rejected at the port of entry no penalty can be recovered.¹ A Dutch steamship company, with branch offices in New York and Dutch Guiana, sent a clerk, who had been in its employment in Amsterdam for three years, to New York to be employed in its office there temporarily, as claimed, and to be afterwards sent to Dutch Guiana, the company paying his transportation expenses. It was held that the case was not within the definition of contract laborers in Section 3; the contract of employment, made long previously, not having been the inducing cause of the migration, which, so far as appeared, was not then contemplated.²

§ 1232. Inducing Immigration by Advertisements of Employment to Aliens.

Section 6 of the same act provides:

That it shall be unlawful and be deemed a violation of section five of the Act to induce, assist, encourage, or solicit or attempt to induce, assist, encourage, or solicit any alien to come into the United States by promise of employment through advertisements printed, published, or distributed in any foreign country, whether such promise is true or false, and either the civil or criminal penalty or both imposed by said section shall be applicable to such a case.

§ 1231. ¹ United States v. River Spinning Co., 250 Fed. 586, 162 C. C. A. 602 (1st Cir.); United States v. Royal Dutch West India Mail, 250 Fed. 913.

² United States v. Royal Dutch West India Mail, *supra*.

§ 1233. Solicitation of Immigration by Transportation Companies.

Section 7 of the act provides :

That it shall be unlawful for any person, association, society, company, partnership, corporation, or others engaged in the business of transporting aliens to or within the United States, including owners, masters, officers, and agents of vessels, directly or indirectly, by writing, printing, oral representation, payment of any commissions to an alien coming into the United States, allowance of any rebates to an alien coming into the United States, or otherwise to solicit, invite, or encourage or attempt to solicit, invite, or encourage any alien to come into the United States, and anyone violating any provision hereof shall be subject to either the civil or the criminal prosecution, or both, prescribed by section five of this Act ; or if it shall appear to the satisfaction of the Secretary of Labor that any owner, master, officer, or agent of a vessel has brought or caused to be brought to a port of the United States any alien so solicited, invited, or encouraged to come by such owner, master, officer, or agent, such owner, master, officer, or agent shall pay to the collector of customs of the customs district in which the port of arrival is located, or in which any vessel of the line may be found, the sum of \$400 for each and every such violation ; and no vessel shall be granted clearance pending the determination of the question of the liability to the payment of such fine, or while the fine imposed remains unpaid, nor shall such fine be remitted or refunded : *Provided*, That clearance may be granted prior to the determination of such questions upon the deposit with the collector of customs of a sum sufficient to cover such fine : *Provided further*, That whenever it shall be shown to the satisfaction of the Secretary of Labor that the provisions of this section are persistently violated by or on behalf of any transportation company, it shall be the duty of said Secretary to deny to such company the privilege of landing alien immigrant passengers of any or all classes at United States ports for such a period as in his judgment may be necessary to insure an observance of such provisions : *Provided further*, That this section shall not be held to

prevent transportation companies from issuing letters, circulars, or advertisements, confined strictly to stating the sailing of their vessels and terms and facilities of transportation therein: *Provided further*, That under sections five, six, and seven hereof it shall be presumed from the fact that any person, company, partnership, corporation, association, or society induces, assists, encourages, solicits or invites, or attempts to induce, assist, encourage, solicit or invite the importation, migration or coming of an alien from a country foreign to the United States, that the offender had knowledge of such person's alienage.

§ 1234. Bringing in, Concealing, or Harboring Aliens not Entitled to Enter.

Section 8 of the act provides:

That any person, including the master, agent, owner, or consignee of any vessel, who shall bring into or land in the United States, by vessel or otherwise, or shall attempt, by himself or through another, to bring into or land in the United States, by vessel or otherwise, or shall conceal or harbor, or attempt to conceal or harbor, or assist or abet another to conceal or harbor in any place, including any building, vessel, railway car, conveyance, or vehicle, any alien not duly admitted by an immigrant inspector or not lawfully entitled to enter or to reside within the United States under the terms of this Act, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding \$2000 and by imprisonment for a term not exceeding five years, for each and every alien so landed or brought in or attempted to be landed or brought in.

§ 1235. Landing of Excluded Aliens Employed on Vessels.

Section 32 of the act provides:

That no alien excluded from admission into the United States by any law, convention, or treaty of the United States regulating the immigration of aliens, and employed on board any vessel arriving in the United States from any foreign port or place, shall be permitted to land in the United States, except temporarily for medical treatment,

or pursuant to regulations prescribed by the Secretary of Labor providing for the ultimate removal or deportation of such alien from the United States, and the negligent failure of the owner, agent, consignee, or master of such vessel to detain on board any such alien after notice in writing by the immigration officer in charge at the port of arrival, and to deport such alien, if required by such immigration officer or by the Secretary of Labor, shall render such owner, agent, consignee, or master liable to a penalty not exceeding \$1000, for which sum the said vessel shall be liable, and may be seized and proceeded against by way of libel in any district court of the United States having jurisdiction of the offense.

CHAPTER LXXVII

OFFENSES IN CONNECTION WITH UNITED STATES CENSUS

§ 1236. Monthly Census Statistics of Cotton Seed and Products — Information Confidential.

§ 1237. False Census Reports — Tobacco Statistics.

§ 1238. Census Reports — Cotton Statistics — Information Confidential.

§ 1236. Monthly Census Statistics of Cotton Seed and Products — Information Confidential.

Section 2 of the Act of Aug. 7, 1916, c. 274, 39 Stat. 437, provides :

That the information furnished by any individual establishment under the provisions of this Act shall be considered as strictly confidential and shall be used only for the statistical purpose for which it is supplied. Any employee of the Bureau of the Census who, without the written authority of the Director of the Census, shall publish or communicate any information given into his possession by reason of his employment under the provisions of this Act shall be guilty of a misdemeanor and shall, upon conviction thereof, be fined not more than \$1000, or imprisoned not more than one year, or both.

§ 1237. False Census Reports — Tobacco Statistics.

Section 4 of the Act of April 30, 1912, c. 102, 37 Stat. 107, is as follows :

Any person who shall make a false report to the Director of the Census as to the types or amounts of tobacco held or owned by him shall be guilty of a misdemeanor, and upon conviction shall be punished by imprisonment for not more than six months, in the discretion of the court. The

president, general manager, or other officer of any corporation making such false report shall be subject to the same penalty as prescribed in this section.

§ 1238. Census Reports — Cotton Statistics — Information Confidential.

Section 3 of the Act of July 22, 1912, c. 249, 37 Stat. 198, is as follows :

The information furnished by any individual establishment under the provisions of this Act shall be considered as strictly confidential and shall be used only for the statistical purpose for which it is supplied. Any employee of the Bureau of the Census who, without the written authority of the Director of the Census, shall publish or communicate any information given into his possession by reason of his employment under the provisions of this Act shall be guilty of a misdemeanor and shall, upon conviction thereof, be fined not less than three hundred dollars or more than one thousand dollars or imprisoned for a period of not exceeding one year, or both so fined and imprisoned, at the discretion of the court.

CHAPTER LXXVIII

SMUGGLING

§ 1239. Smuggling Goods, or Making or Passing False Invoices.

§ 1240. Elements of the Offense.

§ 1239. Smuggling Goods, or Making or Passing False Invoices.

Section 2865 of the Revised Statutes, as amended Feb. 27, 1877, c. 69, 19 Stat. 247, provides that :

If any person shall knowingly and willfully, with intent to defraud the revenue of the United States, smuggle, or clandestinely introduce, into the United States, any goods, wares, or merchandise, subject to duty by law, and which should have been invoiced, without paying or accounting for the duty, or shall make out or pass, or attempt to pass, through the custom-house any false, forged, or fraudulent invoice, every such person, his, her, or their aiders and abettors, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined in any sum not exceeding five thousand dollars, or imprisoned for any term of time not exceeding two years, or both, at the discretion of the court.

This section does not repeal Rev. Stat. § 3082, declaring a forfeiture of goods imported contrary to law.¹ The Supreme Court of the United States expressly held that this section in its complete state is but a reproduction of Section 19 of the tariff act of August 30, 1842.² That portion of the section which made it an offense to smuggle or clandestinely introduce articles into the United States was omitted in the revision of 1874, but the act of February 27, 1877,³ which recites that it was enacted "for the pur-

§ 1239. ¹ United States v. A Lot of Jewelry, 59 Fed. 684; United States v. Ortega, 66 Fed. 713.

² 5 Stat. L. 565, ch. 270.

³ 19 Stat. L. 247, ch. 69.

pose of correcting errors and supplying omissions in the revision", reinstated the omitted clause by an amendment to Section 2865. The Court further held that whatever may be the difficulty of deducing solely from the text of the statute a comprehensive definition of smuggling or clandestine introduction, two conclusions arise from the plain text of the law: First. That whilst it embraces the act of smuggling or clandestine introduction, it does not include mere attempts to commit the same. Nothing in the statute by the remotest possible implication can be found to cover mere attempts to commit the offense referred to. It was contended that as the concealment of goods at the time of entering the waters of the United States tended to render possible a subsequent smuggling, therefore such acts should be considered and treated as smuggling; but this contention was held to be untenable because it overlooked the plain distinction between the attempt to commit an offense and its actual commission. The Court reasoned that, if this premise were true, then every unlawful act which had a tendency to lead up to the subsequent commission of an offense would become the offense itself; that is to say, that one would be guilty of an offense without having done the overt act essential to create the offense, because something had been done which, if carried into further execution, might have constituted the crime. Second. That the smuggling or clandestine introduction of goods referred to in the statute must be "without paying or accounting for the duty" is also beyond question. From the first of the foregoing conclusions it follows that mere acts of concealment of merchandise on entering the waters of the United States, however preparatory they may be and however cogently they may indicate an intention of thereafter smuggling or clandestinely introducing, at best are but steps or attempts not alone in themselves constituting smuggling or clandestine introduction. From the second, it results that as the words "without paying or accounting for the duty" imply the existence of the obligation to pay or account at the time of the commission of the offense, which duty is evaded by the guilty act, it follows that the offense is not committed by an act done before the obligation to pay or account for the duties arises, although such act may indicate a future purpose to evade when the period of paying or securing the payment of

duties has been reached.⁴ An indictment under this statute in the mere language of the statute is insufficient.⁵

§ 1240. Elements of the Offense.

The five specific elements of the offense denounced in this section are: (1) That the goods were, when imported, subject by law to the payment of a customs duty to the United States; (2) were imported clandestinely and secretly; (3) without an entry thereof being made at the custom house of the United States as required by law; (4) without the payment of the duties thereon; and (5) with intent to defraud the United States of its lawful revenue.¹ The section does not include a case where merchandise is fraudulently entered at the custom house. It was alleged that an exporter had caused a false and fraudulent invoice to be made out, signed, verified and left with a consul to be transmitted to the collector of customs at an American port, and had then caused the merchandise covered by the invoice to be shipped to said port; but it was not charged nor shown that he had been concerned in importing the goods. It was held that the case was not brought within the prohibition of the section to "make out or pass, or attempt to pass, through the custom house any false, forged, or fraudulent invoice."² The offense is not committed by an act done before the obligation to pay or account for the duties arises. Mere acts of concealment of merchandise, on entering the waters of the United States, do not, of themselves, constitute smuggling.³ A person becomes guilty of the offense of smuggling by avoiding the first opportunity given to make a customs' declaration and pay the duty. A defendant, having dutiable goods secreted on his person, knowingly passed the customs office at the dock where he entered the United States, and ignored three distinct calls of the customs officer before his further progress was arrested and the goods disclosed, when he stated for the first time that he expected to enter the goods at

⁴ *Keck v. United States*, 172 U. S. 434, 43 L. ed. 505, 19 S. C. 254.

⁵ *Ibid.*

§ 1240. ¹ *Sierra v. United States*, 233 Fed. 37, 147 C. C. A. 107 (1st Cir.).

² *United States v. 646 Half-Boxes of Figs*, 164 Fed. 778.

³ *Keck v. United States*, 172 U. S. 434, 43 L. ed. 505, 19 S. C. 254; *American Sugar Refining Co. v. Bidwell*, 124 Fed. 677.

the main customhouse some distance away, instead of at the dock. It was held that a finding that he intended to evade entering the goods or paying the duty at all, and that he was guilty of smuggling was justified.⁴ An act of smuggling goods contained in a passenger's clothing was held complete when he had passed from the vessel to the shore, and it was immaterial that he had not gone beyond the customs lines established on the dock for convenience in examining baggage.⁵ An indictment charging that the defendant "did knowingly, willfully and unlawfully, and with intent to defraud the revenue of the United States, smuggle and clandestinely introduce into the United States", certain diamonds of a stated value, which should have been invoiced and duty thereon paid or accounted for, but which, to the knowledge of the defendant and with intent to defraud the revenue, were not invoiced, nor the duty paid, or accounted for, was held sufficient.⁶ A charge in an indictment that the defendant "did willfully, unlawfully, and knowingly, and with intent to defraud the revenues of the United States, smuggle and clandestinely introduce into the United States" prepared opium was held to carry with it a direct averment that he knew the duties were not fully paid, and that he was seeking to bring such goods into the United States without their just contribution to the revenues, and therefore was not subject to objection that *scienter* was not alleged.⁷ An indictment for conspiracy to smuggle merchandise and defraud the United States of customs duties need not allege that the defendants intended the merchandise should not be invoiced nor describe the exact manner or means by which it was to be passed through the customs lines.⁸ In an indictment, words charging that the defendant did "bring into the country clandestinely" certain dutiable goods, were held synonymous with the words "clandestinely introduce" in the section.⁹ Persons aiding

⁴ *Rogers v. United States*, 180 Fed. 54, 103 C. C. A. 408 (6th Cir.).

⁵ *United States v.* 218½ Carats Loose Emeralds, 153 Fed. 643.

⁶ *Keck v. United States*, 172 U. S. 434, 43 L. ed. 505, 19 S. C. 254, followed in *United States v. One Blue Taffeta Evening Coat, etc.*, 237

Fed. 703, containing approved form of indictment; *United States v. White*, 171 Fed. 775.

⁷ *Dunbar v. United States*, 156 U. S. 185, 39 L. ed. 390, 15 S. C. 325.

⁸ *United States v. Shevlin*, 212 Fed. 343.

⁹ *Rogers v. United States*, 180

and abetting smuggling cannot be indicted for conspiracy to smuggle under the provisions of this section.¹⁰ Where an indictment charges a violation of this section and also of Rev. Stat. § 3082, an acquittal under the indictment is a bar to a proceeding under Section 3082 to forfeit the goods where the libel charges the same acts and intents made essentials of both sections.¹¹ An acquittal under an indictment for smuggling diamond rings into the United States was held ground for a plea in bar to a libel for the forfeiture of the rings.¹² The offense being only a misdemeanor the defendant is only entitled to three peremptory challenges.¹³

Fed. 54, 103 C. C. A. 408 (6th Cir.), containing form of indictment held sufficient.

¹⁰ *United States v. Shevlin*, *supra*.

¹¹ *Sierra v. United States*, 233 Fed. 37, 147 C. C. A. 107 (1st Cir.).

¹² *United States v. Rosenthal*, 174 Fed. 652, 98 C. C. A. 406 (5th Cir.).

¹³ *Reagan v. United States*, 157 U. S. 301, 39 L. ed. 709, 15 S. C. 610. *See passim* *United States v. Curtis*, 116 Fed. 184, 188; *In re Greenwald*, 77 Fed. 590, 594; but under the present law, *i.e.* Section 335 of the Criminal Code, the offense would be felony.

CHAPTER LXXIX

SHIPPING

- § 1241. Forgery or Counterfeiting Bill.
- § 1242. Penalty for Unlading without Permit.
- § 1243. Forfeiture for Unlawful Transfer.
- § 1244. Posting Copy of Shipping Agreement.
- § 1245. Penalty for not Obtaining New Registry of Vessel.
- § 1246. False Entry of Merchandise Imported.
- § 1247. Officers of Internal Revenue Guilty of Extortion, Unlawful Fees, etc.
- § 1248. Returns by Collectors of Customs of Exports by Rail.
- § 1249. Importation of Grain and Seeds Adulterated or Unfit for Seeding.
- § 1250. Preventing Importations during Time of War.
- § 1251. Discrimination by Vessels against American Citizens or against American Vessels in Time of War.
- § 1252. Selling Lime in Unmarked Barrels and Containers.

§ 1241. Forgery or Counterfeiting Bill.

Section 41 of the Act of Aug. 29, 1916, c. 415, 39 Stat. 544, reads as follows:

That any person who, knowingly or with intent to defraud, falsely makes, alters, forges, counterfeits, prints or photographs any bill of lading purporting to represent goods received for shipment among the several States or with foreign nations, or with like intent utters or publishes as true and genuine any such falsely altered, forged, counterfeited, falsely printed or photographed bill of lading, knowing it to be falsely altered, forged, counterfeited, falsely printed or photographed, or aids in making, altering, forging, counterfeiting, printing or photographing, or uttering or publishing the same, or issues or aids in issuing or procuring the issue of, or negotiates or transfers for value a bill which contains a false statement as to the receipt of the goods, or as to any other matter, or who, with

intent to defraud, violates, or fails to comply with, or aids in any violation of, or failure to comply with any provision of this Act, shall be guilty of a misdemeanor, and, upon conviction, shall be punished for each offense by imprisonment not exceeding five years, or by a fine not exceeding \$5000, or both.

This section unconstitutionally exceeds the powers of Congress under the commerce clause when applied to an entirely fictitious bill of lading having no connection with any actual or contemplated interstate commerce.¹

§ 1242. Penalty for Unlading without Permit.

Section 2867 of the Revised Statutes is as follows :

If after the arrival of any vessel laden with merchandise and bound to the United States, within the limits of any collection-district, or within four leagues of the coast, any part of the cargo of such vessel shall be unladed, for any purpose whatever, before such vessel has come to the proper place for the discharge of her cargo, or some part thereof and has been there duly authorized by the proper officer of the customs to unlade the same, the master of such vessel and the mate, or other person next in command, shall respectively be liable to a penalty of one thousand dollars for each such offense, and the merchandise so unladed shall be forfeited, except in case of some unavoidable accident, necessity, or distress of weather. In case of such unavoidable accident, necessity, or distress, the master of such vessel shall give notice to, and, together with two or more of the officers or mariners on board such vessel, of whom the mate or other person next in command shall be one, shall make proof upon oath before the collector, or other chief officer of the customs of the district, within the limits of which such accident, necessity, or distress happened, or before the collector, or other chief officer of the collection-district, within the limits of which such vessel shall first afterward arrive, if the accident, necessity, or distress happened not within the limits of any district, but within four leagues of the coast of the United States. The collector, or other

§ 1241. ¹ United States v. Ferger, 256 Fed. 388.

chief officer, is hereby authorized and required to administer such oath.¹

The section applies to foreign as well as American vessels.² The vessel must be one bound to the United States, for the purpose of her voyage. The unloading must be of a cargo which is destined to the United States, and to be there discharged.³ An importation into the United States means not merely a bringing within the jurisdictional limits, but also a bringing into some port, harbor or haven, with an intent to land the goods there.⁴ A capture by an enemy is an unavoidable accident within the clause; but peril by capture or tempest must be so instant and pressing as to leave no hope of escape.⁵ Where a vessel is stranded by stress of weather the section does not apply.⁶

§ 1243. Forfeiture for Unlawful Transfer.

Section 2868 of the Revised Statutes provides:

If any merchandise, so unladen from on board any such vessel, shall be put or received into any other vessel, except in the case of such accident, necessity, or distress, to be so notified and proved, the master of any such vessel into which the merchandise shall be so put and received, and every other person aiding and assisting therein, shall be liable to a penalty of treble the value of the merchandise, and the vessel in which they shall be so put shall be forfeited.

§ 1244. Posting Copy of Shipping Agreement.

Section 4519 of the Revised Statutes provides that:

The master shall, at the commencement of every voyage or engagement, cause a legible copy of the agreement,

§ 1242. ¹ See under R. S. § 2867, Vose, 9 How. (U. S.) 372, 13 L. ed. 179.

supra, The Coquitlam, 77 Fed. 744, 23 C. C. A. 438 (9th Cir.); The Cargo *ex* Lady Essex, 39 Fed. 765.

² Schooner Betsy, 1 Mason (U. S.), 354, Fed. Cas. No. 1365.

³ The Coquitlam, *supra*.

⁴ Schooner Mary, 1 Gall. 206, Fed. Cas. No. 9183; The Cargo *ex* Lady Essex, *supra*; Harrison *v.*

United States *v.* Hayward, 2 Gall. 485, Fed. Cas. No. 15336; Peisch *v.* Ware, 4 Cranch (U. S.), 347, 2 L. ed. 643.

⁶ The Cargo *ex* Lady Essex, *supra*; United States *v.* Vowell, 5 Cranch (U. S.), 368, 3 L. ed. 128; Peisch *v.* Ware, *supra*.

omitting signatures, to be placed or posted up in such part of the vessel as to be accessible to the crew; and on default shall be liable to a penalty of not more than one hundred dollars.

§ 1245. Penalty for Not Obtaining New Registry of Vessel.
Section 4169 of the Revised Statutes is as follows:

In every case in which a vessel is required to be registered anew, if she shall not be so registered anew, she shall not be entitled to any of the privileges or benefits of a vessel of the United States. And if her former certificate of registry is not delivered up, except where the same may have been destroyed, lost, or unintentionally mislaid, and an oath thereof shall have been made, as herein before prescribed, the owner of such vessel shall be liable to a penalty of five hundred dollars, to be recovered, with costs of suit.

§ 1246. False Entry of Merchandise Imported.

Section 3050 of the Revised Statutes provides that:

If any merchandise, of which entry shall have been made in the office of a collector, for the benefit of drawback or bounty upon exportation, shall be entered by a false denomination, or erroneously as to the time when and the vessel in which it was imported, or shall be found to disagree with the packages, quantities, or qualities, as they were at the time of original importation, except such disagreement as may have been occasioned by necessary or unavoidable wastage or damage only, and except also in cases where permission shall have been obtained according to law to alter or change the quantities or packages thereof, all such merchandise, or the value thereof to be recovered of the owner or person making such entry, shall be forfeited, and the person making such false entry shall also forfeit a sum equal to the value of the articles mentioned or described in such entry.¹

§ 1246. ¹ *Barlow v. United States*, heads of Sugar, 2 Paine (C. C.), 7 Pet. (U. S.) 404, 8 L. ed. 728; 54, Fed. Cas. No. 15037.
United States v. Eighty-Five Hogs-

§ 1247. Officers of Internal Revenue Guilty of Extortion, Unlawful Fees, etc.

Section 3169 of the Revised Statutes reads as follows :

Every officer or agent appointed and acting under the authority of any revenue law of the United States —

First. Who is guilty of any extortion or willful oppression under color of law ; or,

Second. Who knowingly demands other or greater sums than are authorized by law, or receives any fee, compensation, or reward, except as by law prescribed, for the performance of any duty ; or,

Third. Who willfully neglects to perform any of the duties enjoined on him by law ; or,

Fourth. Who conspires or colludes with any other person to defraud the United States ; or,

Fifth. Who makes opportunity for any person to defraud the United States ; or,

Sixth. Who does or omits to do any act with intent to enable any other person to defraud the United States ; or,

Seventh. Who negligently or designedly permits any violation of the law by any other person ; or,

Eighth. Who makes or signs any false entry in any book, or makes or signs any false certificate or return, in any case where he is by law or regulation required to make any entry, certificate, or return ; or,

Ninth. Who, having knowledge or information of the violation of any revenue law by any person, or of fraud committed by any person against the United States under any revenue law, fails to report, in writing, such knowledge or information to his next superior officer and to the Commissioner of Internal Revenue ; or,

Tenth. Who demands, or accepts, or attempts to collect, directly or indirectly, as payment or gift, or otherwise, any sum of money or other thing of value for the compromise, adjustment, or settlement of any charge or complaint for any violation or alleged violation of law, except as expressly authorized by law so to do, shall be dismissed from office, and shall be held to be guilty of a misdemeanor, and shall be fined not less than one thousand dollars nor more than five thousand dollars, and be imprisoned not less than six

months nor more than three years. The court shall also render judgment against the said officer or agent for the amount of damages sustained in favor of the party injured, to be collected by execution. One-half of the fine so imposed shall be for the use of the United States, and the other half for the use of the informer, who shall be ascertained by the judgment of the court.

An officer of the internal revenue, named as such in the indictment, cannot be jointly indicted with private persons for a conspiracy to defraud the revenue.¹ By the Act of Feb. 8, 1875, c. 36, § 23, 18 Stat. 312, it is provided that :

All acts and parts of acts imposing fines, penalties, or other punishment for offenses committed by an internal revenue officer or other officer of the Department of the Treasury of the United States, or under any bureau thereof, shall be, and are hereby, applied to all persons whomsoever employed, appointed, or acting under the authority of any internal revenue or customs law, or any revenue provision of any law of the United States, when such persons are designated or acting as officers or deputies, or persons having the custody or disposition of any public money.

§ 1248. Returns by Collectors of Customs of Exports by Rail.

Section 1 of the Act of July 16, 1892, c. 196, 27 Stat. 197, as amended March 3, 1893, c. 211, § 1, 27 Stat. 689 reads as follows :

Hereafter collectors of customs shall render to the Bureau of Statistics, in such manner and form and at such periods as the Secretary of the Treasury may prescribe, returns of exports to foreign countries leaving the United States by rail. Any person who shall hereafter deliver to any railway or transportation company or other common carrier commodities for transportation and exportation by rail from the United States to foreign countries, shall also deliver to the collector of customs at the frontier port through which the goods pass into the foreign country a manifest, in such form as the Secretary of the Treasury may prescribe, duly certified as to its accuracy by said

§ 1247. ¹ United States v. McDonald, 3 Dill. (U. S.) 543, Fed. Cas. No. 15670.

person or his agent, exhibiting the kinds, quantities, and values of the several articles delivered by such person or his agent for exportation. And no railway car containing commodities, the product or manufacture of the United States or foreign goods, duty paid or free of duty, intended to be exported to any foreign country, shall be permitted hereafter to leave the United States until the agent of the railway or transportation company, or the person having such car in charge, shall deliver to the customs officer at the last port in the United States through which the commodities pass into foreign territory a manifest thereof, which shall specify the kinds and quantities of the commodities in the form prescribed by the Secretary of the Treasury, and until the manifest, exhibiting the kinds, quantities, and values of the several commodities, shall have been delivered to the collector of customs, as above required, by the person exporting such commodities, or by his agent, or information satisfactory to such customs officer as to the kind, quantities, and values of the domestic and foreign free or duty paid commodities laden on such car. The agent or employee of any railway or transportation company who shall transport such commodities into a foreign country before the delivery to the collector of customs of the manifest, as above required, shall be liable to a penalty of fifty dollars for each offense; Provided, That the provisions of this law shall apply to commodities transported to the frontier in railway cars for exportation and transshipment across the frontier into the adjacent foreign territory in ferry boats or vehicles, so far as to require the person in charge thereof to furnish to the collector of customs information of the kinds, quantities, and values of such commodities; And provided further, That nothing contained in the foregoing shall be held as applicable to goods in transit between American ports by routes passing through foreign territory or to merchandise in transit between places in the Dominion of Canada by routes passing through the United States, or to merchandise arriving at the ports designated under the authority of section three thousand and five of the Revised Statutes, and which may be destined for places in the Republic of Mexico.

§ 1249. Importation of Grain and Seeds Adulterated or Unfit for Seeding.

Section 4 of the Act of Aug. 24, 1912, c. 382, 37 Stat. 507, prohibiting the importation of grain and seeds adulterated or unfit for seeding, provides that:

Any person or persons who shall knowingly violate the provisions of this Act, shall be deemed guilty of a misdemeanor and shall pay a fine of not exceeding five hundred dollars and not less than two hundred dollars: Provided, That any person or persons who shall knowingly sell for seeding purposes seeds or grain which were imported under the provisions of this Act for the purpose of manufacture shall be deemed guilty of a violation of this Act.

§ 1250. Preventing Importations during Time of War.

Section 805 of the Act of Sept. 8, 1916, c. 463, 39 Stat. 799, provides as follows:

That whenever during the existence of a war in which the United States is not engaged, the President shall be satisfied that there is reasonable ground to believe that under the laws, regulations, or practices of any country, colony, or dependency contrary to the law and practice of nations, the importation into their own or any other country, dependency, or colony of any article the product of the soil or industry of the United States and not injurious to health or morals is prevented or restricted the President is authorized and empowered to prohibit or restrict during the period such prohibition or restriction is in force, the importation into the United States of similar or other articles, products of such country, dependency, or colony as in his opinion the public interest may require; and in such case he shall make proclamation stating the article or articles which are prohibited from importation into the United States; and any person or persons who shall import, or attempt or conspire to import, or be concerned in importing, such article or articles, into the United States contrary to the prohibition in such proclamation, shall be liable to a fine of not less than \$2000 nor more than \$50,000, or to imprisonment not to exceed two years, or both, in the

discretion of the court. The President may change, modify, revoke, or renew such proclamation in his discretion.

§ 1251. Discrimination by Vessels against American Citizens or against American Vessels in Time of War.

Section 806 of the Act of Sept. 8, 1916, c. 463, 39 Stat. 799, provides as follows:

That whenever, during the existence of a war in which the United States is not engaged, the President shall be satisfied that there is reasonable ground to believe that any vessel, American or foreign, is, on account of the laws, regulations, or practices of a belligerent Government, making or giving any undue or unreasonable preference or advantage in any respect whatsoever to any particular person, company, firm, or corporation, or any particular description of traffic in the United States or its possessions or to any citizens of the United States residing in neutral countries abroad, or in subjecting any particular person, company, firm, or corporation or any particular description of traffic in the United States or its possessions, or any citizens of the United States residing in neutral countries abroad to any undue or unreasonable prejudice, disadvantage, injury, or discrimination in regard to accepting, receiving, transporting, or delivering, or refusing to accept, receive, transfer, or deliver any cargo, freight or passengers, or in any other respect whatsoever, he is hereby authorized and empowered to direct the detention of such vessels by withholding clearance or by formal notice forbidding departure, and to revoke, modify, or renew any such direction.

That whenever, during the existence of a war in which the United States is not engaged, the President shall be satisfied that there is reasonable ground to believe that under the laws, regulations, or practices of any belligerent country or Government, American ships or American citizens are not accorded any of the facilities of commerce which the vessels or citizens of that belligerent country enjoy in the United States or its possessions, or are not accorded by such belligerent equal privileges or facilities of trade with vessels or citizens of any

nationality other than that of such belligerent, the President is hereby authorized and empowered to withhold clearance from one or more vessels of such belligerent country until such belligerent shall restore to such American vessels and American citizens reciprocal liberty of commerce and equal facilities of trade; or the President may direct that similar privileges and facilities, if any, enjoyed by vessels or citizens of such belligerent in the United States or its possessions be refused to vessels or citizens of such belligerent; and in such case he shall make proclamation of his direction, stating the facilities and privileges which shall be refused, and the belligerent to whose vessels or citizens they are to be refused, and thereafter the furnishing of such prohibited privileges and facilities to any vessel or citizen of the belligerent named in such proclamation shall be unlawful; and he may change, modify, revoke, or renew such proclamation; and any person or persons who shall furnish or attempt or conspire to furnish or be concerned in furnishing or in the concealment of furnishing facilities or privileges to ships or persons contrary to the prohibition in such proclamation shall be liable to a fine of not less than \$2000 nor more than \$50,000 or to imprisonment not to exceed two years, or both, in the discretion of the court.

In case any vessel which is detained by virtue of this Act shall depart or attempt to depart from the jurisdiction of the United States without clearance or other lawful authority, the owner or master or person or persons having charge or command of such vessel shall be severally liable to a fine of not less than \$2000 nor more than \$10,000, or to imprisonment not to exceed two years, or both, and in addition such vessel shall be forfeited to the United States.

That the President of the United States is hereby authorized and empowered to employ such part of the land or naval forces of the United States as shall be necessary to carry out the purposes of this Act.

§ 1252. Selling Lime in Unmarked Barrels and Containers.

Section 5 of the Act of Aug. 23, 1916, c. 396, 39 Stat. 531, provides:

That it shall be unlawful to pack, sell, or offer for sale for shipment from any State or Territory or the District of Columbia to any other State or Territory or the District of Columbia, any barrels or other containers of lime which are not marked as provided in sections two and three of this Act, or to sell, charge for, or purport to deliver from any State or Territory or the District of Columbia to any other State or Territory or the District of Columbia, as a large or small barrel or a fractional part of said small barrel of lime, any less weight of lime than is established by the provisions of this Act; and any person guilty of a violation of the provisions of this Act shall be deemed guilty of a misdemeanor and be liable to a fine not exceeding \$100.

CHAPTER LXXX

CITIZENSHIP

§ 1253. Presumption as to Expatriation of Citizens.

§ 1254. Passports to Persons Who Have Declared Intention to Become Citizens

§ 1253. Presumption as to Expatriation of Citizens.

Section 2 of the Act of March 2, 1907, c. 2534, 34 Stat. 1228, provides as follows:

Any American citizen shall be deemed to have expatriated himself when he has been naturalized in any foreign state in conformity with its laws, or when he has taken an oath of allegiance to any foreign state. When any naturalized citizen shall have resided for two years in the foreign state from which he came, or for five years in any other foreign state it shall be presumed that he has ceased to be an American citizen, and the place of his general abode shall be deemed his place of residence during said years: Provided, however, That such presumption may be overcome on the presentation of satisfactory evidence to a diplomatic or consular officer of the United States, under such rules and regulations as the Department of State may prescribe: And provided also, That no American citizen shall be allowed to expatriate himself when this country is at war.

It was within the power of Congress to lay down the rule contained in this section even as applied to a naturalized citizen who had left the United States for the land of his birth before the act was passed. The section does not refer only to the status of naturalized citizens while abroad, but applies when a naturalized citizen, after living abroad for the statutory period, returns to the United States; and, when such a person presents himself for admission to the country, the presumption is that he is no longer an American citizen. This presumption is rebutta-

ble.¹ The act is penal and should be limited strictly to citizens. The fact that an honorably discharged soldier of the United States army, while an alien, returned to Switzerland, where he held an elective office for a time, did not bar his right to become a citizen as one of the privileges of his military service, as provided by Rev. Stat. § 2166, Comp. St. 4355.² A person born in the United States, residing in New York, who went with his family to Gananoque, Canada, June 30, 1916, enlisted in the Canadian army for oversea service July 15, 1916, took the oath of allegiance, deserted August 5, 1916, and returned surreptitiously to the United States August 6, 1916, was held to have voluntarily expatriated himself and was an alien, subject to deportation as such. The fact that the enlistment was for "one year or during the war" between England and Germany and six months thereafter did not change the effect of taking the oath of allegiance, which contained no limitation.³

§ 1254. Passports to Persons Who Had Declared Intention to Become Citizens.

Section 1 of the Act of March 2, 1907, c. 2534, 34 Stat. 1228, provides:

That the Secretary of State shall be authorized, in his discretion, to issue passports to persons not citizens of the United States as follows: Where any person has made a declaration of intention to become such a citizen as provided by law and has resided in the United States for three years a passport may be issued to him entitling him to the protection of the Government in any foreign country: *Provided*, That such passport shall not be valid for more than six months and shall not be renewed, and that such passport shall not entitle the holder to the protection of this Government in the country of which he was a citizen prior to making such declaration of intention.

While the statutes are silent on the subject, the intention of Congress that there should be no naturalizations for temporary purposes may be deduced by this section.¹

§ 1253. ¹ *United States v. Howe*, 231 Fed. 546; *Stein v. Fleischmann Co.*, 237 Fed. 679.

² *In re Wildberger*, 214 Fed. 508.

³ *Ex parte Griffin*, 237 Fed. 445.

§ 1254. ¹ *In re Naturalization of Aliens in Service of Army or Navy of United States*, 250 Fed. 316.

CHAPTER LXXXI

MISCELLANEOUS POSTAL VIOLATIONS

- § 1255. Paid Editorials or Other Reading Matter Must Be Marked "Advertisement."
§ 1256. Disposal of Penalties, Forfeitures and Fines for Post Office Violations.
§ 1257. Post Office Department — Remitting Fines, Penalties and Forfeitures.

§ 1255. Paid Editorials or Other Reading Matter Must Be Marked "Advertisement."

Section 2 of the act of Aug. 24, 1912, c. 389, 37 Stat. 554, provides:

That all editorial or other reading matter published in any such newspaper, magazine, or periodical for the publication of which money or other valuable consideration is paid, accepted, or promised shall be plainly marked "advertisement." Any editor or publisher printing editorial or other reading matter for which compensation is paid, accepted, or promised without so marking the same, shall, upon conviction in any court having jurisdiction, be fined not less than fifty dollars (\$50) nor more than five hundred dollars (\$500).

§ 1256. Disposal of Penalties, Forfeitures and Fines for Post Office Violations.

Section 4050 of the Revised Statutes provides that:

All penalties and forfeitures imposed for any violation of law affecting the Post-Office Department or its revenue or property shall be recoverable, one-half to the use of the person informing and prosecuting for the same, and the other half to be paid into the Treasury for the use of the Post-Office Department, unless a different disposal is ex-

pressly prescribed. All fines collected for violations of such laws shall be paid into the Treasury for the use of the Post-Office Department.

§ 1257. Post Office Department — Remitting Fines, Penalties and Forfeitures.

Section 409 of the Revised Statutes reads as follows :

In all cases of fine, penalty, forfeiture, or disability, or alleged liability for any sum of money by way of damages or otherwise, under any provision of law in relation to the officers, employees, operations, or business of the postal service, the Postmaster-General may prescribe such general rules and modes of proceeding as shall appear to be expedient, for the government of the Sixth Auditor, in ascertaining the fact in each case in which the Auditor shall certify to him that the interests of the Department probably require the exercise of his powers over fines, penalties, forfeitures, and liabilities; and upon the fact being ascertained, the Auditor may, with the written consent of the Postmaster-General, mitigate or remit such fine, penalty, or forfeiture, remove such disability, or compromise, release, or discharge such claim for such sum of money and damages, and on such terms as the Auditor shall deem just and expedient.

CHAPTER LXXXII

PATENT LAW AND COPYRIGHTS VIOLATIONS

§ 1258. Falsely Marking or Labeling Articles.

§ 1259. Limitation of Criminal Proceedings under Copyright Act.

§ 1258. Falsely Marking or Labeling Articles.

Section 4901 of the Revised Statutes is as follows :

Every person who, in any manner, marks upon anything made, used, or sold by him for which he has not obtained a patent, the name or any imitation of the name of any person who has obtained a patent therefor without the consent of such patentee, or his assigns or legal representatives ; or

Who, in any manner, marks upon or affixes to any such patented article the word “ patent ” or “ patentee”, or the words “ letters-patent”, or any word of like import, with intent to imitate or counterfeit the mark or device of the patentee, without having the license or consent of such patentee or his assigns or legal representatives ; or

Who, in any manner, marks upon or affixes to any unpatented article the word “ patent”, or any word importing that the same is patented, for the purpose of deceiving the public, shall be liable, for every such offense, to a penalty of not less than one hundred dollars, with costs ; one-half of said penalty to the person who shall sue for the same, and the other to the use of the United States, to be recovered by suit in any district court of the United States within whose jurisdiction such offense may have been committed.

§ 1259. Limitation of Criminal Proceedings under Copyright Act.

Section 39 of the Copyright Act of March 4, 1909, c. 320, 35 Stat. 1084, provides that :

No criminal proceeding shall be maintained under the provisions of this act unless the same is commenced within three years after the cause of action arose.

CHAPTER LXXXIII

RECEIVERSHIPS — DISTRICT ATTORNEYS — APPROPRIATIONS

§ 1260. Illegal Fees to District Attorneys, etc. — Failure to Account for Fees.

§ 1261. Management of Property by Receivers.

§ 1262. Violation of Appropriation Act, § 4.

§ 1262 *a.* Court Officers Appropriating Money.

§ 1260. Illegal Fees to District Attorneys, etc. — Failure to Account for Fees.

Section 18 of the Act of May 28, 1896, c. 252, 29 Stat. 183, is as follows :

Any officer whose compensation is fixed by sections six to fifteen, inclusive, of this Act who shall directly or indirectly demand, receive, or accept any fee or compensation for the performance of any official service other than is herein provided, or shall willfully fail or neglect to account for or pay over to the proper officer any fee received or collected by him shall, upon conviction thereof, be punished by a fine of not less than fifty dollars nor more than five hundred dollars, or by imprisonment, at the discretion of the court, not exceeding five years, or by both such fine and imprisonment.

§ 1261. Management of Property by Receivers.

Section 65 of the Judicial Code provides as follows :

Whenever in any cause pending in any court of the United States there shall be a receiver or manager in possession of any property, such receiver or manager shall manage and operate such property according to the requirements of the valid laws of the State in which such property shall be situated, in the same manner that the owner or possessor thereof would be bound to do if in possession

thereof. Any receiver or manager who shall willfully violate any provision of this section shall be fined not more than three thousand dollars, or imprisoned not more than one year, or both.

§ 1262. Violation of Appropriation Act, § 4.

Section 5 of the Appropriation Act of August 23, 1912, c. 350, 37 Stat. 414, provides that any person violating Section 4 of the legislative, executive, and judicial appropriation Act of August 5, 1882, 22 Stat. 255, shall be summarily removed from office, and may also upon conviction thereof be punished by a fine of not more than \$1000, or by imprisonment for not more than one year.

OFFENSES RELATING TO OFFICIAL DUTIES

§ 1262 *a*. Court Officers Appropriating Money.

Any United States marshal, clerk, receiver, referee, trustee, or other officer of a United States court, or any deputy, assistant, or employee of any such marshal, clerk, receiver, referee, trustee, or other officer who shall, after demand by the party entitled thereto, unlawfully retain or who shall convert to his own use or to the use of another any moneys received for or on account of cost or advance deposits to cover fees, expenses, or costs, deposits for fees or expenses in bankruptcy cases, composition funds or money of bankrupt estates, fees in naturalization matters, or any other money whatever which has come into his hands by virtue of his official relation or by the fact of his official position or employment shall be deemed guilty of embezzlement and shall, where the offense is not otherwise punishable by some statute of the United States, be fined not more than double the value of the money thus retained or converted or imprisoned not more than ten years, or both; and it shall not be a defense in such a case that the accused person had an interest, contingent or otherwise, in some part of such moneys or of the fund from which they were retained or converted.¹

§ 1262 *a*. ¹ Act of May 29, 1920, entitled "An act to provide for the punishment of officers of United States courts wrongfully converting money coming into their possession, and for other purposes," cited above.

CHAPTER LXXXIV

DAIRY PRODUCTS

§ 1263. False Labeling or Branding of Dairy or Food Products in Interstate Commerce.

§ 1263. False Labeling or Branding of Dairy or Food Products in Interstate Commerce.

Section 2 of the Act of July 1, 1902, c. 1357, 32 Stat. 632, prohibiting the introduction into one State or territory from another, or the sale in a territory or the District of Columbia of dairy or food products falsely labeled or branded as to the State or territory in which the same is made, produced or grown, provides :

If any person or persons violate the provisions of this Act, either in person or through another, he shall be guilty of a misdemeanor and shall be punished by a fine of not less than five hundred nor more than two thousand dollars ; and that the jurisdiction for the prosecution of said misdemeanor shall be within the district of the United States court in which it is committed.

CHAPTER LXXXV

FEDERAL ANTI-TRUST AND INTERSTATE COMMERCE ACTS

THE SHERMAN ACT

- § 1264. History of the Sherman Act.
- § 1265. The Statute.

WEBB ACT

- § 1266. Exempting Foreign Trade — Definition of Export Trade.
- § 1267. Constitutionality and Validity of the Act.
- § 1268. Construction — In General.
- § 1269. Use of Debates in Congress in the Construction of the Sherman Act.
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- § 1274. Scope and Interpretation of Criminal Sections of Statute.
- § 1275. The Act Does Not Apply to Intrastate Manufacturing Business.
- § 1276. Restraint Must Be Direct.
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- § 1279. Test of Legality of Agreement.
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- § 1281. Means.
- § 1282. Size of Business Immaterial.
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- § 1286. Act Applies to Interstate Railroads.
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- § 1288. Particular Acts.
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- § 1290. Definitions — In General.
- § 1291. "Restraint of Trade" Defined.
- § 1292. Conspiracy under Section 1.

- § 1293. "Conspiracy" Defined.
- § 1294. "Any Part" of Interstate Trade or Commerce Defined.
- § 1295. Distinction between Restraint of Competition and Restraint of Trade.
- § 1296. "Engage In" Combination or Conspiracy Defined.
- § 1297. "Trade" as Used in the Statute.
- § 1298. "Trade" and "Commerce" Synonymous in the Statute.
- § 1299. "Monopoly" Defined.
- § 1300. Monopolizing through Combinations.
- § 1301. Monopoly and Restraint of Trade.
- § 1302. Monopoly Need Not Be Complete.
- § 1303. "Control" Equivalent to "Monopolize."
- § 1304. Interstate Commerce — "Commerce" Defined.
- § 1305. "Commerce."
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- § 1308. Rule of Reason.
- § 1309. The Change of the Rule as Announced in the Standard Oil and Tobacco Cases.
- § 1310. Monopoly and the Rule of Reason.
- § 1311. What Is Unreasonable Restraint of Trade?
- § 1312. How Is the Standard to Be Applied?
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- § 1314. Intent.
- § 1315. Good Motives Immaterial.
- § 1316. Indictments — Following Language of Statute Insufficient.
- § 1317. Insufficient Indictments.
- § 1318. Overt Acts Need Not Be Charged.
- § 1319. Time.
- § 1320. Charging Defendants Jointly.
- § 1321. Duplicity.
- § 1322. Consolidation of Indictments.
- § 1323. "Monopolize."
- § 1324. Doubt as to Meaning Resolved against Prosecution.
- § 1325. Where Allegation of Intent Unnecessary.
- § 1326. Causes of Action under Sherman and Clayton Acts.
- § 1327. Sufficient Indictments.
- § 1328. Bill of Particulars in a Prosecution under the Sherman Act.
- § 1329. Immunity Statutes.
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- § 1331. Time — Denial of Allegation under Plea of Not Guilty.
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CLAYTON ACT, OCTOBER 15, 1914 (ANTI-TRUST ACT)

§ 1338. The Sherman Act as Affected by the Clayton Act — Text of the Clayton Act.

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§ 1341. Notes on Federal Trade Commission Act.

§ 1342. Purpose and Scope of Act.

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ELKINS ACT

§ 1346. Constitutionality of Elkins Act.

§ 1347. Who May Be Liable.

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§ 1349. What Constitutes Offense.

HEPBURN ACT

§ 1350. Hepburn Act — Effect of Guilty Knowledge.

§ 1351. Foreign Commerce.

§ 1352. Indictment — Sufficiency.

§ 1353. Indictments Insufficient for Uncertainty and Want of Particularity.

§ 1354. Duplicity.

§ 1355. When Only One Offense.

§ 1356. Intent.

§ 1357. Knowledge.

THE SHERMAN ACT

§ 1264. History of the Sherman Act.

Senator Sherman of Ohio, on December 4, 1889, introduced into Congress a bill of three sections, known as Senate Bill No. 1 of the Fifty-first Congress, which he entitled "A bill to declare unlawful trusts and combinations in restraint of trade and production." This bill never became law. On July 2, 1890, however, Congress passed and President Harrison approved of a more comprehensive bill in eight sections which was drawn by Senator Hoar of Massachusetts with the approval of Senator Sherman,

and which, in view of the fact that the latter was the real originator of this legislation, has invariably been known since as the Sherman Act. The act appears to have been passed and approved by the President in the exact words of Senator Hoar, who was at the time a member of the Judiciary Committee, the members of which had unanimously agreed to the bill after careful discussion. The title of the original bill was altered so as to read: "A Bill to protect trade and commerce against unlawful restraints and monopolies." The title of the original Sherman bill would not have been suitable, the substituted bill aiming, not to regulate production, but merely trade and commerce. Throughout its passage, however, until its approval on July 2, 1890, the bill retained its original number of Senate Bill No. 1 of the Fifty-first Congress. The act was passed, said Mr. Justice Harlan,¹ in response to a universal demand to rid the people of a threatened danger of a form of industrial slavery produced by trusts and combinations as a result of aggregations of capital in the hands of a few individuals and corporations controlling, for their own profit and advantage exclusively, the entire business of the country, including the production and sale of the necessities of life. Such a danger was thought to be then imminent, and all felt that it must be met firmly and by such statutory regulations as would adequately protect the people against oppression and wrong. Congress therefore took up the matter and gave the whole subject the fullest consideration.

§ 1265. The Statute.

The criminal sections of the Sherman Act as passed in 1890 are as follows:

Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished

§ 1264. ¹ See *concurring and dissenting* opinion in *Standard Oil* case, 221 U. S. 1, 55 L. ed. 619, 31 S. C. 502.

by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Sec. 3. Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or in the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is hereby declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.¹

WEBB ACT

§ 1266. Exempting Foreign Trade — Definition of Export Trade.

The Sherman Act relating to foreign commerce was amended by the Act of April 10, 1918,¹ known as the "Webb Act" and is as follows:

That the words "export trade" wherever used in this Act mean solely trade or commerce in goods, wares, or merchandise exported, or in the course of being exported from the United States or any Territory thereof to any foreign nation; but the words "export trade" shall not be

§ 1265. ¹ 26 Stat. L. 209, c. 647.

deemed to include the production, manufacture, or selling for consumption or for resale, within the United States or any Territory thereof, of such goods, wares, or merchandise, or any act in the course of such production, manufacture, or selling for consumption or for resale.

That the words "trade within the United States" wherever used in this Act mean trade or commerce among the several States or in any Territory of the United States, or in the District of Columbia, or between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or between the District of Columbia and any State or States.

That the word "association" wherever used in this Act means any corporation or combination, by contract or otherwise, of two or more persons, partnerships, or corporations.

Sec. 2. That nothing contained in the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", approved July second, eighteen hundred and ninety, shall be construed as declaring to be illegal an association entered into for the sole purpose of engaging in export trade and actually engaged solely in such export trade, or an agreement made or act done in the course of export trade by such association, provided such association, agreement, or act is not in restraint of trade within the United States, and is not in restraint of the export trade of any domestic competitor of such association: *And provided further*, That such association does not, either in the United States or elsewhere, enter into any agreement, understanding, or conspiracy, or do any act which artificially or intentionally enhances or depresses prices within the United States of commodities of the class exported by such association, or which substantially lessens competition within the United States or otherwise restrains trade therein.

Sec. 3. That nothing contained in section seven of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October fifteenth, nineteen hundred and fourteen, shall be construed to forbid the acquisition or ownership by any corporation of the whole or any part of the stock or

other capital of any corporation organized solely for the purpose of engaging in export trade, and actually engaged solely in such export trade, unless the effect of such acquisition or ownership may be to restrain trade or substantially lessen competition within the United States.

Sec. 4. That the prohibition against "unfair methods of competition" and the remedies provided for enforcing said prohibition contained in the Act entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes", approved September twenty-sixth, nineteen hundred and fourteen, shall be construed as extending to unfair methods of competition used in export trade against competitors engaged in export trade, even though the acts constituting such unfair methods are done without the territorial jurisdiction of the United States.

Sec. 5. That every association now engaged solely in export trade, within sixty days after the passage of this Act, and every association entered into hereafter which engages solely in export trade, within thirty days after its creation, shall file with the Federal Trade Commission a verified written statement setting forth the location of its offices or places of business and the names and addresses of all its officers and of all its stockholders or members, and if a corporation, a copy of its certificate or articles of incorporation and by-laws, and if unincorporated, a copy of its articles or contract of association, and on the first day of January of each year thereafter it shall make a like statement of the location of its offices or places of business and the names and addresses of all its officers and of all its stockholders or members and of all amendments to and changes in its articles or certificate of incorporation or in its articles or contract of association. It shall also furnish to the commission such information as the commission may require as to its organization, business, conduct, practices, management, and relation to other associations, corporations, partnerships, and individuals. Any association which shall fail so to do shall not have the benefit of the provisions of section two and section three of this Act, and it shall also forfeit to the United States the sum of \$100 for each and every day of the continuance of such

failure, which forfeiture shall be payable into the Treasury of the United States, and shall be recoverable in a civil suit in the name of the United States brought in the district where the association has its principal office, or in any district in which it shall do business. It shall be the duty of the various district attorneys, under the direction of the Attorney-General of the United States, to prosecute for the recovery of the forfeiture. The costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States.

Whenever the Federal Trade Commission shall have reason to believe that an association or any agreement made or act done by such association is in restraint of trade within the United States or in restraint of the export trade of any domestic competitor of such association, or that an association either in the United States or elsewhere has entered into any agreement, understanding, or conspiracy, or done any act which artificially or intentionally enhances or depresses prices within the United States of commodities of the class exported by such association, or which substantially lessens competition within the United States or otherwise restrains trade therein, it shall summon such association, its officers, and agents to appear before it, and thereafter conduct an investigation into the alleged violations of law. Upon investigation, if it shall conclude that the law has been violated, it may make to such association recommendations for the readjustment of its business, in order that it may thereafter maintain its organization and management and conduct its business in accordance with law. If such association fails to comply with the recommendations of the Federal Trade Commission, said commission shall refer its findings and recommendations to the Attorney-General of the United States for such action thereon as he may deem proper.

For the purpose of enforcing these provisions the Federal Trade Commission shall have all the powers, so far as applicable, given it in "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes."

Approved, April 10, 1918.

§ 1267. Constitutionality and Validity of the Act — Power of Congress.

The question of the constitutionality of the Sherman Act appears first to have been raised in 1898 in the Joint Traffic Association Case.¹ There it was held that the act does not violate the "due process" clause of the Constitution as arbitrarily depriving the citizen, by a general statute, of the right to make a proper contract, necessary to carry out his lawful purposes. The question which arises in such a case is whether the contract is a proper or lawful one. The statute is a legitimate exercise of the power of Congress over interstate commerce and a valid regulation thereof. The act is not unconstitutional as extending the power of Congress to subjects *dehors* the reach of its authority to regulate commerce, by enabling it to deal with mere questions of production of commodities within the State.² Congress had authority to enact the statute under its power to regulate commerce among the several States and with foreign nations.³ It has been definitely held by the Supreme Court of the United States that the criminal features of the Sherman Act are not void for lack of definiteness or certainty.⁴ The contention that the crime defined by the statute contains an element of degree as to which estimates may suffer was overruled. It was held that the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it; that the criterion in such cases is to examine whether common social duty would, under the circumstances, have suggested a more circumspect conduct.⁵ The criminal and civil proceedings may be begun simultaneously or at different times, and no hard and fast rule can be fixed. It is for the Government to decide upon the course to be pursued, which may be regulated by the

§ 1267. ¹ *United States v. Joint Traffic Assn.*, 171 U. S. 505, 573, 43 L. ed. 259, 19 S. C. 25.

² *Standard Oil Co. v. United States*, 221 U. S. 1, 68, 55 L. ed. 691, 31 S. C. 502.

³ *Northern Securities Co. v. United States*, 193 U. S. 197, 332, 49 L. ed. 723, 25 S. C. 428.

⁴ *Nash v. United States*, 229 U. S. 373, 57 L. ed. 1232, 33 S. C. 780; *United States v. Winslow*, 195 Fed. 578, 585, — C. C. A. — (— Cir.); *United States v. New Departure Mfg. Co.*, 204 Fed. 107, 114.

⁵ *Nash v. United States*, *supra*.

Court.⁶ In another case⁷ it was held that the statute is not unconstitutional as being so general that it cannot be enforced by the courts without a judicial exertion of legislative power, merely because it is left to the judiciary to decide whether in a given case particular acts come within a generic statutory provision. Accordingly, it was decided that the act is a valid criminal statute, sufficiently clear in itself to inform the accused of the nature and cause of the accusation against him, and criminal prosecutions under it do not deprive the defendants of liberty or property without due process of law.⁸ It was held that the jurisdiction conferred on the Federal Courts as courts of equity by Section 4 to "prevent and restrain violations of this act" being made dependent on the preceding criminal sections and confined to preventing the carrying out of that which is declared in the preceding sections to be criminal, every decision of the courts sustaining an injunction granted under Section 4 has necessarily determined that the preceding sections are valid, and that the things enjoined were crimes. In view of the numerous decisions of the Supreme Court upholding such injunctions, the validity of the criminal sections is therefore no longer open to question in the inferior courts,⁹ but it is doubtful whether the Sherman Act is at the present time *per se* a criminal statute, it having been, in many respects, either expressly or impliedly, modified and enlarged by the Clayton Act and the Federal Trade Commission Act. These Acts as well as the Act known as the "Webb Act" (exempting in certain instances foreign commerce from the operation of the law), and the Interstate Commerce Act are in *pari materia* with the Sherman Act and must be read together

§ 1268. Construction — In General.

In construing statutes the courts will not close their eyes to what they know of the history of the country and of the law, of the condition of the law at a particular time, of the public necessi-

⁶ Standard Sanitary Manufacturing Company v. United States, 226 U. S. 20, 57 L. ed. 107, 33 S. C. 9.

⁷ Standard Oil Co. v. United States, *supra*.

⁸ United States v. Patterson, 201

Fed. 697, 715; United States v. American Naval Stores Co., 186 Fed. 592, 594.

⁹ United States v. Swift, 188 Fed. 92, 96.

ties felt, and other kindred things, for the reason that regard must be had to the words in which the statute is expressed as applied to the facts existing at the time of the enactment.¹ Where there is no statutory provision to guide it, a Federal statute must be construed with reference to the common law existing prior to the Declaration of Independence; there being no Federal common law.² In order to decide whether acts charged are within the condemnation of a statute, the Court must first ascertain what the statute does condemn, and that involves its construction.³

§ 1269. Use of Debates in Congress in the Construction of the Sherman Act.

There is a general acquiescence in the doctrine that debates in Congress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body. The reason is that it is impossible to determine with certainty what construction was put upon an act by the members of a legislative body by resorting to the speeches of individual members thereof. Those who did not speak may not have agreed with those who did; and those who spoke might differ from each other; the result being that the only proper way to construe a legislative act is from the language used in the act, and, upon occasion, by a resort to the history of the times when it was passed.¹ This is the general rule unless the language of the statute is ambiguous.² The principles above announced are, however, not violated by resorting to debates as a means of ascertaining the environment at the time of the enactment of a particular law; that is, the history of the period when

§ 1268. ¹ *Mannington v. Hocking Valley R. Co.*, 183 Fed. 133, 155.

² *United Copper Sec. Co. v. Amalgamated Copper Co.*, 232 Fed. 574, 577, 146 C. C. A. 532 (2d Cir.).

³ *United States v. Patten*, 226 U. S. 525, 536, 57 L. ed. 333, 33 S. C. 141. The decision handed down by the United States Supreme Court on March 1, 1920, in the *United States Steel Case*, *United States v. United States Steel Corporation*, — U. S. —, 64 L. ed. 222, — S. C. —, heard

before seven Justices, — three Justices dissenting, — is so novel that the author prefers not to comment on same, and instead attention to it will be called in connection with the text showing the change of the law.

§ 1269. ¹ *United States v. Trans-Missouri Freight Assn.*, 166 U. S. 290, 318, 41 L. ed. 1007, 17 S. C. 540.

² *United States v. United Shoe Mach. Co.*, 234 Fed. 127, 143.

it was adopted.³ And the debates in Congress show that doubt as to whether there was a common law of the United States, which governed the subject in the absence of legislation, was among the influences leading to the passage of the act. They conclusively show, however, that the main cause which led to the legislation was the thought that it was required by the economic condition of the times.⁴

§ 1270. Language of Act Clear.

This statute defines the acts to be unlawful, in simple English. The purpose of the act, ascertained from the language used, is as clear as may be. The legislative purpose inspiring its passage is interesting as a matter of history, but, in the absence of ambiguity or uncertainty in the words or phrases used, is, legally speaking, at least unimportant. Canons of construction and means, used commonly by the courts to determine legislative intent, serve only to confuse, when that intent is clearly expressed. Rules of construction serve no good purpose, when there is nothing to construe. Courts ought not to interpret that which has no need of interpretation, and, when the words of a statute have a definite and precise meaning, to go elsewhere in search of conjecture, in order to restrict or extend the meaning.¹

§ 1271. Acts Forbidden — In General.

While the act does not forbid or restrain the power to make usual and normal contracts to further trade through normal methods, whether by agreement or otherwise, it does forbid contracts entered into according to a concerted scheme to unduly suppress competition and restrain freedom of commerce among

³ *Standard Oil Co. v. United States*, 221 U. S. 1, 50, 55 L. ed. 691, 31 S. C. 502; *Mannington v. Hocking Valley R. Co.*, 183 Fed. 133, 155; *United States v. Patterson*, 55 Fed. 605, 641.

⁴ *Standard Oil Co. v. United States*, *supra*, but *see contra*, on effect of industry, if the corporation were dissolved, the decision of United States Supreme Court in *United States v. United States Steel Corpo-*

ration (March 1, 1920). The case was a suit for injunction and receiver and being a mere civil action does not directly settle any question of criminal law or criminal responsibility.

§ 1270. ¹ *United States v. Swift*, 188 Fed. 92, but *see* dissenting opinions by Harlan, J. in *Standard Oil case*, *supra*, and by Day, J. in *United States Steel Case*.

the states.¹ In other words, it broadly condemns all combinations and conspiracies which restrain the free and natural flow of trade in the channels of interstate commerce.² Congress has declared illegal practices which unduly restrain competition or unduly obstruct the free flow of interstate commerce.³ The Sherman Act is directed against restraint of interstate or foreign trade; that is, against restraining the business of buying or selling for gain, whenever the transaction forms a part of commerce among the states or with foreign countries.⁴ The Sherman Act covers any illegal means by which interstate commerce is restrained, whether by unlawful combinations of capital, or unlawful combinations of labor; and also whether the restraint be occasioned by unlawful contracts, trusts, pooling arrangements, blacklists, boycotts, coercion, threats, intimidation, and whether these be made effective, in whole or in part, by acts, words, or printed matter.⁵ The act is intended to reach combinations and conspiracies which restrain freedom of action in interstate trade and commerce, and unduly suppress or restrict the play of competition in the conduct thereof.⁶ It is the scope of such combinations and their power to suppress or stifle competition or create monopoly which determines the applicability of the act.⁷ The act prohibits the devising of means for deterring others from manufacturing certain articles, or restricting the localities in which they may deal in such articles, fixing sales prices, or

§ 1271. ¹ *United States v. Reading Co.*, 226 U. S. 324, 355, 57 L. ed. 243, 33 S. C. 90.

² *Eastern States Ret. Lum. Deal. Assn. v. United States*, 234 U. S. 600, 609, 58 L. ed. 1490, 34 S. C. 95.

³ *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 44 L. ed. 136, 20 S. C. 96; *Eastern States R. L. D. Assn. v. United States*, *supra*.

⁴ *United States v. Keystone Watch Case Co.*, 218 Fed. 502, 515. *But see* Webb Act passed April 10, 1918, § 1266, virtually exempting foreign trade from the operation of the Sherman Act.

⁵ *Gompers v. Buck's Stove &*

Range Co., 221 U. S. 418, 55 L. ed. 797, 31 S. C. 492; *Loewe v. Lawlor*, 208 U. S. 274, 52 L. ed. 488, 28 S. C. 301; *Eastern States R. L. D. Assn. v. United States*, *supra*.

⁶ *United States v. Union Pacific R. Co.*, 226 U. S. 61, 57 L. ed. 124, 33 S. C. 53, *citing* *United States v. Joint Traffic Assn.*, 171 U. S. 505, 43 L. ed. 259, 19 S. C. 25.

⁷ *United States v. Union Pacific R. Co.*, 226 U. S. 61, 57 L. ed. 124, 33 S. C. 53, *citing* *Pearsall v. Gt. Northern R. Co.*, 161 U. S. 646, 676, 40 L. ed. 838, 16 S. C. 705; *United States v. Joint Traffic Assn.*, 171 U. S. 505, 577, 43 L. ed. 259, 19 S. C. 25.

adopting regulations for governing dealers, to be enforced by special rewards or penalties, inevitably resulting in concentration of business in the hands of a few, and which may also result in giving to a single person or corporation such a unification of interest or management as to constitute an illegal monopoly.⁸

§ 1272. Strangling Competition.

The Sherman Act in terms declares illegal every combination, in whatever form and of whatever nature, which directly or necessarily operates in restraint of trade or commerce among the several States or with foreign nations. While by its later decisions the Supreme Court has interpreted the statute as not restraining the "power to make normal and usual contracts to further trade by resorting to all normal methods, whether by agreement or otherwise, to accomplish such purposes", and has declared that the words "restraint of trade" should be given a meaning which would not destroy the individual right of contract and render difficult, if not impossible, any movement of trade in interstate commerce, the free movement of which it was the purpose of the statute to protect, it may yet be regarded as well settled that a combination formed for the express purpose and with the express intent of eliminating natural and existing competition in interstate commerce, and of monopolizing and restraining such interstate commerce, by the employment of unusual and abnormal methods of business, constitutes undue restraint or suppression, and so offends against the anti-trust act, and that a combination which places the direct instrumentalities of interstate commerce in such a relation as to create a single dominating control in one corporation, whereby natural and existing competition in interstate commerce is unduly restricted or suppressed, is within the condemnation of the act.¹

⁸ *United States v. Eastman Kodak Co.*, 226 Fed. 62, 77 *citing* *National Cotton Oil Co. v. Texas*, 197 U. S. 115, 49 L. ed. 689, 25 S. C. 379. For cases affecting *resale* price fixing, *see* *United States v. A. Schrader & Sons*, decided by the Supreme Court of the United States, March 1, 1920, and *compare* *United States v.*

Colgate, 250 U. S. 300, — L. ed. — 39 S. C. 465.

§ 1272. ¹ *Northern Securities Co. v. United States*, 193 U. S. 197, 48 L. ed. 679, 24 S. C. 436; *Standard Oil Co. v. United States*, 221 U. S. 1, 55 L. ed. 619, 31 S. C. 502; *United States v. Tobacco Co.*, 221 U. S. 106, 55 L. ed. 663, 31 S. C. 632;

A corporation that is financially embarrassed may lease its property to a competitor that had a dominating part in the industry in which it was engaged, but it may not as a part of the same transaction covenant to discourage competition against its tenant, and bind itself not to engage in the same business within fifty miles of any plant operated by the tenant, and as the elimination of competition was the controlling factor in making such a lease, it was held that it was illegal, in aid of a scheme of monopoly, and a violation of the Sherman Act.² The Sherman Act does not require that the defendants should have engaged in interstate commerce. If they were all engaged exclusively in intrastate commerce, and they formed a conspiracy to restrain the trade of the manufacturers and wholesalers who were engaged in interstate commerce, that would make them guilty.³

§ 1273. Protection of Property Rights.

One of the fundamental purposes of the statute is to protect, not to destroy, rights of property. Therefore, a court should not make any decree which would violate such purpose.¹ When the Constitution of the United States conferred on Congress the right "to regulate commerce with foreign nations and among the several states", its purpose was not to fetter, but to further and foster trade.² The monopoly and restraint denounced by the act are the monopoly and restraint of interstate commerce and not mere monopoly in the manufacture of a necessary of life.³ The regulation of commerce applies to subjects of commerce and not to matters of internal police.⁴ The act does not take up State laws for original enforcement. It deals only with

United States *v.* Reading Co., 226 U. S. 324, 57 L. ed. 243, 33 S. C. 90; United States *v.* Great Lakes Towing Co., 208 Fed. 733, 741.

² Shawnee Compress Co. *v.* Anderson, 209 U. S. 423, 52 L. ed. 865, 28 S. C. 572.

³ Knauer *v.* United States, 237 Fed. 8, 13, 150 C. C. A. 210 (8th Cir.); Loewe *v.* Lawlor, 208 U. S. 274, 301, 52 L. ed. 488, 28 S. C. 301; Nash *v.* United States, 229 U. S. 373, 379, 57 L. ed. 1232, 33 S. C. 780;

Patterson *v.* United States, 222 Fed. 599, 618, 138 C. C. A. 123.

§ 1273. ¹ Standard Oil Co. *v.* United States, 221 U. S. 1, 78, 55 L. ed. 691, 31 S. C. 502; United States *v.* United States Steel Corporation (U. S. Sup. Ct., March 1, 1920).

² United States *v.* Steel Corp., 223 Fed. 55.

³ United States *v.* E. C. Knight Co., 156 U. S. 1, 10, 39 L. ed. 325, 15 S. C. 249.

⁴ *Ibid.*

actual conditions affecting interstate commerce whether authorized by State laws or not.⁵ It does not concern itself with the interest of the parties, but with the interest of the public.⁶

§ 1274. Scope and Interpretation of Criminal Sections of Statute.

There can be no doubt that the sole subject with which the first section deals is restraint of trade as therein contemplated, and that the attempt to monopolize and monopolization is the subject with which the second section is concerned.¹ Section 1 makes a distinction between a contract and a combination or conspiracy in restraint of trade.² The act is primarily a criminal statute, prohibiting certain acts as unlawful restraints and monopolies of interstate trade and commerce and prescribing the punishment therefor,³ although it is not exclusively so and the act must be read together with all subsequent legislation. The Court cannot read into the act more than it finds there.⁴ The act is a limitation of rights which may be pushed to evil consequences which should be restrained.⁵ The character of the act is sufficiently comprehensive and thorough to prevent evasions of its policy by disguise and subterfuge. It is its own measure of right and wrong; courts cannot declare an agreement which is against its policy legal because of the good intentions of the parties making it.⁶

§ 1275. The Act Does Not Apply to Intrastate Manufacturing Business.

The act does not apply to a contract or combination relating to the business of manufacturing or the production of articles or

⁵ *United States v. Southern Pacific Co.*, 239 Fed. 998.

⁶ *United States v. Delaware, etc. R. Co.*, 238 U. S. 516, 59 L. ed. 1438, 35 S. C. 873.

§ 1274. ¹*Standard Oil Co. v. United States*, 221 U. S. 1, 55 L. ed. 619, 31 S. C. 502.

² *Rice v. Standard Oil Co.*, 134 Fed. 464.

³ *United States v. Swift*, 188 Fed. 92, 96; *Standard Sanitary Mfg. Co.*

v. United States, 226 U. S. 20, 57 L. ed. 107, 33 S. C. 9.

⁴ *Nash v. United States*, 229 U. S. 373, 378, 57 L. ed. 1232, 33 S. C. 780.

⁵ *Standard Sanitary Mfg. Co. v. United States*, *supra*.

⁶ *Standard Sanitary Mfg. Co. v. United States*, *supra*, but see majority opinion of United States Supreme Court in the *United States Steel Case*, decided March 1, 1920.

commodities within a State.¹ Contracts by which certain large and influential sugar refining corporations (which controlled all of the sugar refineries in the United States excepting those that they were to purchase) acquired a practical monopoly by the purchase of stock in the only other competing sugar refining corporations in the State of Pennsylvania were held not in violation of the Sherman Act. The Court, per Chief Justice Fuller, said: "... but the contracts and acts of the defendants related exclusively to the acquisition of the Philadelphia refineries and the business of sugar refining in Pennsylvania, and bore no direct relation to commerce between the States, or with foreign nations. The object was manifestly private gain in the manufacture of the commodity, but not through the control of interstate or foreign commerce."² Under an agreement among corporations of various States engaged in the manufacture, sale, transportation and delivery of iron pipe, one of the parties was chosen to bid for the supply of pipe for delivery in certain territory, and it was agreed that all other bids by members of the combination should be for a larger sum, thus practically restricting all but the member agreed upon from furnishing pipe or entering into competition for the business in that territory. It was held that "in regard to such of the defendants as might reside and carry on business in the same State where the pipe provided for in any particular contract was to be delivered, the sale, transportation, and delivery of the pipe by them under that contract would be a transaction wholly within the State, and the statute would not be applicable to them in that case. They might make any combination they chose with reference to the proposed contract, although it should happen that some nonresident of the State eventually obtained it."³ The disintegration aimed at by the statute does not extend to reducing all manufacture to isolated units of the lowest degree.⁴

§ 1275. ¹ *Robinson v. Suburban Brick Co.*, 127 Fed. 804, 62 C. C. A. 484 (4th Cir.); *Hammer v. Dagenhart*, 247 U. S. 251, 62 L. ed. 1101, 38 S. C. 529; *Northern Securities Co. v. United States*, 193 U. S. 197, 331, 48 L. ed. 679, 24 S. C. 436.

² *United States v. E. V. Knight*

Co., 156 U. S. 1, 17, 39 L. ed. 325, 331, 15 S. C. 249.

³ *Addyston Pipe Steel Co. v. United States*, 175 U. S. 211, 44 L. ed. 136, 20 S. C. 96.

⁴ *United States v. Winslow*, 227 U. S. 202, 57 L. ed. 81, 433 S. C. 253.

§ 1276. Restraint Must Be Direct.

A combination which promotes, or only incidentally or indirectly restricts, competition, while its main purpose and chief effect are to promote the business and increase the trade of the makers, is not denounced by the act.¹ But any agreement or combination which directly operates, not alone upon the manufacture, but upon the sale, transportation and delivery of an article of interstate commerce, by preventing or restricting its sale, thereby regulates interstate commerce to that extent, and thus trenches upon the power of the national legislature, and violates the statute.² To fall within the prohibitions of the statute it is necessary that the unlawful restraint of trade — and this is not always the same thing as the mere restraint of competition — should be direct, and not merely incidental, and should also be undue or unreasonable. If it be both direct and undue, no disguise will save it; courts will search for the substance and the actual effect of the transaction, and, if trade be unlawfully restrained thereby, will grant the needful relief.³

§ 1277. No Overt Act Necessary.

No overt act is necessary in order to constitute a violation of the act, the offense being complete when the conspiracy is entered into.¹ It is not necessary to the guilt of the defendants that the conspiracy should be successful.² The act punishes the conspiracies at which it is aimed on the common law footing — that

§ 1276. ¹ *Phillips v. Iola Portland Cement Co.*, 125 Fed. 593, 61 C. C. A. 19 (8th Cir.); *Field v. Barber Asphalt Paving Co.*, 194 U. S. 618, 48 L. ed. 1142, 24 S. C. 784; *United States v. United States Steel Corporation* (U. S. Sup. Ct., March 1, 1920).

² *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 44 L. ed. 136, 20 S. C. 96.

³ *United States v. Keystone Watch Case Co.*, 218 Fed. 502, 507. *See also United States v. Motion Picture Patents Co.*, 225 Fed. 800, *distinguishing* the *Keystone* case.

§ 1277. ¹ *United States v. Bopp*, 237 Fed. 283; *Knauer v. United States*, 237 Fed. 8, 150 C. C. A. 210 (8th Cir.); *United States v. Rintelen*, 233 Fed. 793; *United States v. Patterson*, 201 Fed. 697, 722; *United States v. Cowell*, 243 Fed. 730; *Nash v. United States*, 229 U. S. 373, 57 L. ed. 1232, 33 S. C. 780, *but see, contra*, *United States v. United States Steel Corporation* (U. S. Sup. Ct., March 1, 1920).

² *Knauer v. United States*, *supra*.

is to say, it does not make the doing of any act other than the act of conspiring a condition of liability. The decisions as to the relations of a subsequent overt act to crimes under the general conspiracy act³ have no bearing upon a statute that does not contain the requirement found in that section.⁴

§ 1278. Unlawful Agreement Essence of Offense.

Unlawful agreement is the essence of the offense of combination or conspiracy under the act. It is what separates what is permitted from what is forbidden. To hold it illegal for persons in the same business and same trade organization, after exchanging information and views, to act in the same way, but independently of each other, on buying, selling, or prices, would extend the scope of the act beyond anything heretofore decided, and beyond the proper meaning, and would cause the greatest confusion and uncertainty.¹ The necessary agreement or understanding may, of course, be tacit as well as expressed; its existence may be inferred, and, even in criminal cases, often is inferred, from the conduct of the parties.² But while concert of action among the members of an association, in causing commodities owned and controlled by them to be disposed of in accordance with a "concerted plan," as set forth in the indictment, strongly suggests agreement, that alone will not charge, in an indictment, an unlawful agreement essential under the act.³

§ 1279. Test of Legality of Agreement.

The legality of an agreement or regulation cannot be determined by so simple a test as whether it restrains competition.

³ R. S. Sec. 5440, Sec. 37 Penal Code.

⁴ *Nash v. United States*, *supra*.

§ 1278. ¹ *United States v. M. Piowaty & Sons*, 251 Fed. 375, *citing* *United States v. American Naval Stores Co.*, 172 Fed. 455, 460; *Patterson v. United States*, 222 Fed. 599, 631, 138 C. C. A. 123, 155 (6th Cir.). *See also* *United States v. Greenhut*, 51 Fed. 205, and *Eastern States Ret. Lumber Dealers' Assn. v.*

United States, 234 U. S. 600, 58 L. ed. 1490, 34 S. C. 951.

² *United States v. M. Piowaty & Sons*, *supra*; *Eastern States Ret. Lumber Dealers' Assn. v. United States*, *supra*; *United States v. American Naval Stores Co.*, *supra*.

³ *United States v. M. Piowaty & Sons*, *supra*; *United States v. United States Steel Corporation* (U. S. Sup. Ct., March 1, 1920).

Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.¹ In the Board of Trade case it was held that a rule or agreement prohibiting members from purchasing between certain periods was held not to be in restraint of trade.²

§ 1280. Injury to Public the Test.

Not every joinder of competing business or acquisition of instrumentalities that have been used in competition is an undue restraint of trade or the creation of a monopoly. Each situation must be measured by the rule of reason. And a fundamental test is injury to the public. A law designed to shield the public from injury should not be construed to compel the public to suffer an injury. So it is held that a concern, going out of business because it cannot go on without loss, may, without violation of the act, sell its plant as a going concern to its only competitor, in the absence of any other prospective purchaser, instead of disposing of it as junk, where this will not injure, but will be to the advantage of the public, provided the purchaser is required to continue to deal fairly with the public.¹

§ 1279. ¹ Board of Trade of the City of Chicago v. United States, 246 U. S. 231, 238, 62 L. ed. 683, 38 S. C. 242.

² Chicago Board of Trade v. United States, *supra*.

§ 1280. ¹ American Press Assn. v. United States, 245 Fed. 91, 157 C. C. A. 387 (7th Cir.).

§ 1281. Means.

It is immaterial that the means by which the restraint was to be accomplished operated solely within the boundaries of one State.¹ And if the conspiracy is unlawful, it is immaterial that the means used to carry it out are in themselves innocent.²

§ 1282. Size of Business Immaterial.

Mere size, or bigness of business, is not necessarily a monopoly of business at the expense of all others engaged in it. Success or magnitude of business, the rewards of fair and honorable endeavor, were not among the evils which threatened the public welfare and attracted the attention of Congress. But when they had been attained by wrongful or unlawful methods, and competition has been crippled or destroyed, the elements of monopoly are present.¹ And when acquisitions are accompanied by an intent to monopolize and restrain interstate trade by an arbitrary use of the power resulting from a large business to eliminate a weaker competitor, then they no doubt come within the meaning of the statute.²

§ 1283. Pooling Agreements.

This country has always been committed to the principle of fair and real competition in business — the struggle between individuals to sell goods in a market free from artificial control or influence — and the Sherman Act merely repeats the principle when it condemns, in the first section, “every contract or combination in restraint of trade.” When, therefore, individuals or corporations make distinct contracts with each other, either in the form of pools or other agreements, dividing territory, limiting

§ 1281. ¹ *United States v. Patten*, 226 U. S. 525, 57 L. ed. 333, 33 S. C. 141; *United States v. Reading Co.*, 226 U. S. 324, 57 L. ed. 243, 33 S. C. 90; *Swift & Co. v. United States*, 196 U. S. 375, 49 L. ed. 518, 25 S. C. 276.

² *Patterson v. United States*, 222 Fed. 599, 138 C. C. A. 123 (6th Cir.); *Nash v. United States*, 229 U. S. 373, 57 L. ed. 1232, 33 S. C. 780; *Northern Securities Co. v. United*

States, 193 U. S. 197, 48 L. ed. 679, 24 S. C. 436.

§ 1282. ¹ *United States v. Standard Oil Co. of New Jersey*, 173 Fed. 177, 196; *United States v. United States Steel Corp.*, 223 Fed. 55, 96; *United States v. Eastman Kodak Co.*, 226 Fed. 62, 80; *United States v. United States Steel Corp.* (U. S. Sup. Ct., March 1, 1920).

² *United States v. Eastman Kodak Co.*, *supra*.

output or fixing prices, there can be no question as to the illegality of such contracts. And it makes no difference whether or not the agreement attempts to fix a penalty for its breach. The essence of the offense is that agreement; the penalty is merely an incident.¹

§ 1284. Involuntary Restraints.

Section 1 is not confined to voluntary restraints, as where persons engaged in interstate trade or commerce agree to suppress competition among themselves, but includes as well involuntary restraints, as where persons not so engaged conspire to compel action by others, or to create artificial conditions, which necessarily impede or burden the due course of such trade or commerce or restrict the common liberty to engage therein.¹ As was said of this section in the Standard Oil case:² "The context manifests that the statute was drawn in the light of the existing practical conception of the law of restraint of trade, because it groups as within that class, not only contracts which were in restraint of trade in the subjective sense, but all contracts or acts which theoretically were attempts to monopolize, yet which in practice had come to be considered as in restraint of trade."³

§ 1285. Scope and Effect of Sections 1 and 2.

Trade may be restrained — that is, hindered, or obstructed, or destroyed — in many ways and by many devices, but these are all covered by the first and second sections of the act. In these sections two classes of prohibited acts are described: (1) The concerted action of two or more persons, which may take the form of a contract, a combination in whatever form, or a conspiracy; and (2) monopoly, or the attempt to monopolize, which may be the act of one person alone, or of more than one. These two classes are intended to be all-embracing, and thus far in the history of the statute no variety of device has escaped their sweep.¹

§ 1283. ¹ *United States v. United States Steel Corp.*, 223 Fed. 55, 155.

§ 1284. ¹ *Loewe v. Lawlor*, 208 U. S. 274, 293, 301, 52 L. ed. 488, 28 S. C. 301.

² 221 U. S. 1, 55 L. ed. 619, 31 S. C. 502.

³ *United States v. Patten*, 226 U. S. 525, 541, 57 L. ed. 333, 33 S. C. 141.

§ 1285. ¹ *United States v. Keystone Watch Case Co.*, 218 Fed. 502, 515.

§ 1286. Act Applies to Interstate Railroads.

The act applies to interstate railroads as carriers conducting interstate commerce, and one of the principal instrumentalities thereof.¹ An agreement between competing interstate railroads for the purpose of fixing and maintaining rates is within the statute.² But this rule has been relaxed by the new Railroad Act of 1920, leaving the whole subject matter within the discretion of the Interstate Commerce Commission.

§ 1287. Officers of Corporations May Be Guilty.

The individuals that actively conduct the affairs of the corporations in the illegal combination are held guilty along with the corporations and it is error to dismiss the suit as against them and to find the corporate defendants alone guilty.¹

§ 1288. Particular Acts.

A combination of the owners of motion picture apparatus patents and the creation of an organization which by its improper practices drove all but one of one hundred and sixteen jobbers out of business is a combination in violation of the Sherman Act. The right of monopoly granted by the patent laws is no defense to the improper practices; and it is not intended that the patent laws should nullify the Sherman Act.¹ A combination which controlled more than 86% of the cigarette business, a dominant interest in the cigar and snuff business and the major portion of the tin foil and 95% of the licorice root business, the two latter being necessary accessories to the tobacco business, is a combination in violation of the Sherman Act.² "Running a corner" in cotton by means of buying up all the future cotton that was

§ 1286. ¹ *United States v. Union Pacific R. R. Co.*, 226 U. S. 61, 57 L. ed. 124, 33 S. C. 53; *United States v. Trans-Missouri Freight Assn.*, 166 U. S. 290, 41 L. ed. 1007, 17 S. C. 540; *United States v. Joint Traffic Assn.*, 171 U. S. 505, 43 L. ed. 259, 19 S. C. 25. See Federal Railroad Act of 1920 permitting pooling and consolidation of competing lines with the approval of Interstate Commerce Commission.

² *United States v. Joint Traffic Assn.*, *supra*.

§ 1287. ¹ *United States v. American Tobacco Co.*, 221 U. S. 106, 55 L. ed. 663, 696, 31 S. C. 632.

§ 1288. ¹ *United States v. Motion Picture Patents Co.*, 225 Fed. 800.

² *United States v. American Tobacco Co.*, 221 U. S. 106, 55 L. ed. 663, 31 S. C. 632.

offered for sale on the New York Cotton Exchange, the purpose being to buy up in this manner more cotton than would be available and in that way create an abnormal demand for cotton, causing the price to drop, and thereafter withholding the cotton so as to cause the price of cotton to go up unnaturally, is a violation of the Sherman Act.³ In the *Eastern States Retail Lumber Dealers' Assn. v. United States*⁴ defendants were various lumber associations composed largely of retail lumber dealers of several states. These defendants, acting in concert, distributed among its members a document known as the "Official Report", in which were published the names and addresses of various wholesale lumber dealers who sold to the consumer direct. This was coupled with a request that if any members learned of any other wholesalers selling direct to the consumer this should be reported to the association, and, if found substantiated, the names of these wholesalers were added. Among the members this list was referred to as a blacklist and the retailers felt that these wholesalers were encroaching on their business by selling direct. There was no concerted plan or scheme to boycott these wholesalers. But in commenting on this scheme Mr. Justice Day said: "True it is that there is no agreement among the retailers to refrain from dealing with listed wholesalers, nor is there any penalty annexed for the failure so to do; but he is blind indeed who does not see the purpose in the predetermined and periodical circulation of this report to put the ban upon wholesale dealers whose names appear in the list of unfair dealers trying by methods obnoxious to the retail dealers to supply the trade which they regard as their own." And he further said: "... In other words, the trade of the wholesaler with strangers was directly affected, not because of any supposed wrong which he had done to them, but because of the grievance of a member of one of the associations, who had reported a wrong to himself, which grievance, when brought to the attention of others, it was hoped would deter them from dealing with the offending party. This practice takes the case out of those normal and usual agreements in aid of trade and

³ *United States v. Patten*, 226 U. S. 525, 57 L. ed. 333, 33 S. C. 141. *Dealers' Association v. United States*, 234 U. S. 600, 58 L. ed. 1490, 34 S.

⁴ *Eastern States Ret. Lumber* C. 951.

commerce which may be found not to be within the act, and puts it within the prohibited class of undue and unreasonable restraints, such as was the particular subject of condemnation in the *Loewe* case.”⁵ And where a packing company engaged in slaughtering and packing cattle within the State, the carcasses and products of which they intended to transport and sell for human consumption in other States, it was held that it was not engaged in interstate commerce.⁶ When cattle are sent for sale from a place in one state, with the expectation that they will end their transit after purchase in another, and when in effect they do so, with only the interruption necessary to find a purchaser at the stock yards, and when this is a typical constantly recurring course, the current thus existing is a current of commerce among the States, and the purchase of the cattle is a part and incident of such interstate commerce.⁷ A scheme for the domination by a holding company of two great competing interstate railroads, and of two competing coal companies extensively engaged in mining and selling anthracite coal which must be transported to interstate markets over the railroads’ lines, effectually suppressing all competition between the four companies and pooling their earnings, was held an undue and unreasonable restraint of interstate trade and commerce, and an attempt to monopolize and a monopolization of such trade and commerce in anthracite coal, forbidden by the Sherman Act and calling for the dissolution of the combination.⁸

§ 1289. Re-Sale Agreements.

Where a manufacturer of products shipped in interstate trade he was not subject to criminal prosecution under the act for entering into a combination in restraint of such trade and commerce for agreeing with his wholesale and retail customers upon prices claimed by them to be fair and reasonable, at which they may be resold, and for declining to sell his products to those who will not thus stipulate as to such prices. It was held that the general language of the act is limited by the power which each individual

⁵ 208 U. S. 274, 52 L. ed. 488, 28 S. C. 301.

⁶ *United States v. Boyer*, 85 Fed. 425, reviewing the authorities.

⁷ *Swift & Co. v. United States*,

196 U. S. 375, 398, 399, 49 L. ed. 518, 525, 25 S. C. 276.

⁸ *United States v. Reading Co.*, — U. S. — 64 L. ed. 481, — S. C. —.

has to manage his own property and determine the place and manner of its investment and disposal, if he proceeds in respect thereto in a lawful and *bona fide* manner.¹ It was further held that a manufacturer has a right to contract to sell his product only to such dealers as will agree to resell the product at a price suggested by the manufacturer and will agree not to resell to other dealers;² also that there is nothing in the Sherman Act that prevents a single trader from rejecting a customer because he does not like the prices at which the customer resold, or otherwise disapproved of his mode of conduct. Nor does the fact that a single trader extends his policy of refusing to sell to any one of many customers, who may cut prices, impose any additional legal liability,³ and the appointment by a manufacturing company in one State of a company in another State as its exclusive selling agent is not a violation of any right under the common law or the Sherman Act.⁴ But it has been recently held that when these acts are accomplished as a result of an agreement or combination such re-sale agreements are within the condemnation of the Sherman Act.⁵ These cases are difficult to reconcile. Likewise it was held the Sherman Act does not apply to a combination of manufacturers of separate and distinct shoe machinery, each manufacturer making a machine not made by the other and used in different steps in the manufacture of shoes, and, therefore, not competing with each other.⁶

§ 1290. Definitions — In General.

The act adopts the common law in making combinations and conspiracies in restraint of the designated trade and commerce

§ 1289. ¹ *United States v. Colgate & Co.*, 253 Fed. 522, 525, *citing* prior cases, *affirmed* by U. S. Supreme Court, 250 U. S. 300, — L. ed. —, 39 S. C. 465, but *compare* *United States v. Schroder & Sons*, decided by United States Supreme Court March 1, 1920.

² *Baran v. Goodyear Tire & Rubber Co.*, 256 Fed. 571; *United States v. Colgate & Co.*, *supra*; *Dueber Watch-Case Manfg. Co. v. Howard Watch & Clock Co.*, 66 Fed. 637, 646, 14 C. C. A. 14 (2d Cir.); *Whitwell v. Continental Tobacco*

Co., 125 Fed. 454, 60 C. C. A. 290 (8th Cir.); *Union Pacific Coal Co. v. United States*, 173 Fed. 737, 97 C. C. A. 578 (8th Cir.).

³ *Baran v. Goodyear Tire & Rubber Co.*, *supra*, *citing cases*.

⁴ *Baran v. Goodyear Tire & Rubber Co.*, *supra* (treble damages), *citing* civil cases.

⁵ *United States v. Schrader & Sons* (U. S. Sup. Ct., March 1, 1920).

⁶ *United States v. Winslow*, 227 U. S. 202, 57 L. ed. 481, 33 S. C. 253.

criminal offenses, and creates a new crime, in making contracts in restraint of trade misdemeanors, and indictable as such; but the act does not undertake to define what constitutes a contract, combination, or conspiracy in restraint of trade, and recourse must therefore be had to the common law for the proper definition of these general terms, and to ascertain whether the acts charged come within the statute.¹

§ 1291. "Restraint of Trade" Defined.

It is now well settled that the words "restraint of trade" in the Sherman Act are to be construed as including "restraint of competition." Full, free and untrammelled competition in all branches of interstate commerce is the desideratum to be secured. "Competition, free and unrestricted, is the general rule which governs all the ordinary business pursuits and transactions of life. Evils as well as benefits result therefrom. In the fierce heat of competition, the stronger competitor may crush out the weaker; fluctuations in prices may be caused that result in wreck and disaster; yet, balancing the benefits as against the evils, the law of competition remains as a controlling element in the business world. That free and unrestricted competition . . . may be productive of evils does not militate against the fact that such is the law now governing the subject."¹ There is no distinction between the phrase "in restraint of trade" and the phrase "to injure trade" and "to restrain trade." Any contract, combination, or conspiracy, to be "in restraint of trade", must involve the use of means of which the effect is "to injure" or "to restrain" trade. A contract, combination, or conspiracy in restraint of trade is therefore a contract, combination, or conspiracy to restrain or to injure trade.² Suppression of competition, where the parties to a combination control a large portion of the interstate or foreign commerce in the article, and where there is no obligation to form the combination arising out of the fact that the parties to it are losing money, or the like, has been held an

§ 1290. ¹ In re Greene, 52 Fed. 104, 111.

§ 1291. ¹ United States v. Trans-Missouri Freight Association, 166 U. S. 290, 337, 41 L. ed. 1007, 17

S. C. 540; United States v. Eastern States Ret. Lumber Dealers' Assn., 201 Fed. 581.

² United States v. Debs, 64 Fed. 724, 748.

undue restraint of trade.³ It has been laid down as a general rule that if companies could not make a legal contract as to prices or as to collateral services they could not legally unite, and where defendant companies did in effect unite, the sole question was as to whether they would have agreed on prices and what collateral services they could render, when their companies were all prosperous and they jointly controlled 80 to 85 per cent of the business in that line in the United States.⁴

§ 1292. Conspiracy under Section 1.

It is now settled that Section 1 covers those contracts, combinations and conspiracies only which are unreasonably in restraint of interstate trade or commerce. Possibly every conspiracy in restraint thereof is unreasonably so. This is on the idea that there is no such thing as a reasonable conspiracy, or a conspiracy to do a reasonable thing. It is a contradiction in terms. The section includes conspiracies between competitors, or between the officers and agents of a competitor on its behalf against a competitor. But it is not limited by such conspiracies. It includes also conspiracies between any persons, whoever they may be, against any other person.¹ It is not essential that the execution of the conspiracy be of any benefit to the conspirators. It is sufficient that it will be in restraint of another's interstate trade or commerce. And it is immaterial what is the extent of the interstate trade or commerce conspired against. In the case of *Steers v. United States*,² it was held that a conspiracy in restraint of a single interstate shipment was within the section. There is no act of interstate trade or commerce so insignificant as not to be protected by it.³

§ 1293. "Conspiracy" Defined.

Before the decision in the Kissel case,¹ the question of the continuance of a conspiracy was in confusion and the authorities

³ *United States v. International Harvester Co.*, 214 Fed. 987, *but see* *United States v. United States Steel Corporation* (U. S. Sup. Ct., March 1, 1920).

⁴ *United States v. International Harvester Co.*, 214 Fed. 987, 999.

§ 1292. ¹ *Loewe v. Lawlor*, 208 U. S. 274, 52 L. ed. 488, 28 S. C. 301.

² 192 Fed. 1, 112 C. C. A. 423 (6th Cir.).

³ *Patterson v. United States*, 222 Fed. 599, 618, 138 C. C. A. 123 (6th Cir.).

§ 1293. ¹ *United States v. Kissel*, 218 U. S. 601, 54 L. ed. 1168, 31 S. C. 124.

in conflict. This confusion no longer exists. The position there combated was that a conspiracy could not have continuance in time. It was urged that it could not, because it consisted in an unlawful agreement, and an agreement does not have continuance. These contentions, ably pressed, seemed to be justified by the common definition of a conspiracy as an agreement to do an unlawful thing, or to do a lawful thing by unlawful means. But it was held that this is no longer an accurate definition of a conspiracy. The agreement simply initiates the conspiracy, but it is not the whole of it. Mr. Justice Holmes said: "It is true that the unlawful agreement satisfies the definition of the crime, but it does not exhaust it." And again he said: "A conspiracy is constituted by an agreement, it is true; but it is the result of the agreement, rather than the agreement itself, just as a partnership, although constituted by a contract, is not the contract, but is the result of it. The contract is instantaneous; the partnership may endure as one and the same partnership for years. A conspiracy is a partnership in criminal purposes." This is now an accurate definition of a conspiracy. In another case² it was said that it is "a partnership in criminal purposes", brought about by an agreement. So long then, as the partnership in a criminal purpose continues, the conspiracy continues. And it may continue without anything being done in furtherance of it. The court gives the following illustration: X. and Y. conspire on a day or two before the beginning of the period within which an indictment on a certain date may be found to murder Z., or to commit some other crime on a day certain one week off; *i.e.*, several days after the beginning of that period. After the beginning thereof, they abandon the conspiracy, either by a formal understanding, or by allowing the day to go by without doing anything, and never renewing it. In such case the partnership in the criminal purpose continues into the period. In so far, then, as it continued into the period, it was not barred by the statute of limitations. The court held that the mere fact that the prosecution for the agreement which initiated the partnership is barred is no reason for barring it as to so much of the partnership as has continued into the period. It may be important to show something done

² *Patterson v. United States*, 222 Fed. 599, 631, 138 C. C. A. 123 (6th Cir.).

in furtherance of the conspiracy within the period to establish its continuance into it. It is not essential to its continuance thereinto.

§ 1294. "Any Part" of Interstate Trade or Commerce Defined.

What is "any part" of interstate trade or commerce, within the meaning of Section 2? What are the possible parts of interstate trade or commerce that may be covered by it? The interstate trade or commerce in a particular commodity of all prospective purchasers thereof in the United States is a part of interstate trade or commerce; also the interstate trade or commerce in such commodity of all prospective purchasers thereof in some particular portion thereof is a part thereof. And also the interstate trade or commerce in such commodity of any prospective purchaser thereof wherever located in the United States is a part thereof. There can be no question that the first two are parts of interstate trade or commerce within the meaning of the statute. The case of *Montague & Co. v. Lowry*¹ involved a monopolizing of the second part of interstate trade or commerce above referred to. The only question is as to the third part. Is the interstate trade or commerce of a prospective purchaser a part thereof within it? Reviewing earlier cases on the subject the U. S. Circuit Court of Appeals held² that the Sherman Act excludes therefrom the interstate trade or commerce of a particular prospective purchaser of a particular commodity, and confines it to the interstate trade or commerce of all prospective purchasers of a particular commodity in the United States or in some particular portion thereof.³ It is also true, of course, that the mere continuance of the result of a crime does not continue the crime.⁴

§ 1295. Distinction between Restraint of Competition and Restraint of Trade.

There is a distinction between restraint of competition and restraint of trade. The latter expression had, when the act was

§ 1294. ¹ 193 U. S. 38, 48 L. ed. 608, 24 S. C. 307.

² *Patterson v. United States*, 222 Fed. 599, 622, 138 C. C. A. 123 (6th Cir.).

³ *Whitwell v. Continental Tobacco Co.*, 125 Fed. 454, 60 C. C. A.

290 (8th Cir.); *United States v. Standard Oil Co. of New Jersey*, 173 Fed. 177, 191; *United States v. American Tobacco Co.*, 164 Fed. 700, 727.

⁴ Mr. Justice Holmes in *United States v. Kissel*, 218 U. S. 601, 607, 54 L. ed. 1168, 31 S. C. 12

passed, a definite legal signification. Not every combination in restraint of competition was, in a legal sense, in restraint of trade. Two men in the same town engaged in the same business as competitors may unite in a copartnership, and thereafter, as between themselves, substitute coöperation for competition. Their combination restrains competition, and if their town is located near the line between two states, and each has been trading in both states, their combination restrains competition in interstate trade. But it does not necessarily follow that such restraint of competition is a restraint of interstate trade and commerce. The determination of whether it be so must depend upon the facts and circumstances of each individual case. It is undoubtedly the policy of the statute that competitive conditions in interstate trade should be maintained wherever their abolition would tend to suppress or diminish such trade. But this being true does not read into the statute a denunciation of all agreements that may restrain competition without regard to their purpose or direct effect to restrain "trade or commerce among the several states." To what extent the anti-trust act condemns combinations that restrain full and free competition in interstate trade is a question that has been much debated. For a dozen years, at least, it has been settled that it does not condemn combinations which only indirectly, remotely, or incidentally restrain interstate trade.

§ 1296. "Engage In" Combination or Conspiracy Defined.

The phrase "engage in such combination or conspiracy" is used in a broad sense, and includes, not only such persons as initiate a conspiracy, but also those who afterwards engage therein. In legal parlance, the words "engage in" signify embark in, take part in, or en'ist in, and when they are used in connection with the words "combination or conspiracy", as in the act, they mean substantially the same thing as to conspire; for one who engages in a conspiracy becomes a conspirator, regardless of whether or not the conspiracy has previously been initiated. In describing the offense without limitations, or without the inclusion of a condition that an overt act need be first committed to complete the offense, Congress doubtless had in mind this definition.¹

§ 1296. ¹ United States v. New Departure Mfg. Co., 204 Fed. 107, 111.

§ 1297. "Trade" as Used in the Statute.

The Anti-Trust Law was enacted "to protect trade and commerce against unlawful restraints and monopolies." The word "trade" means the buying as well as the selling of property, and the statute extends its protection to those who buy as well as to those who sell. A practice that is helpful to the seller, but is hurtful to the buyer, is as fully within the inhibition of the statute as a practice pursued by one seller which unlawfully restrains the trade of another seller. Therefore it may be assumed without discussion, that the statute intends to protect the purchasing public from the consequences of combinations which, either in their purpose or effect, so raise and maintain prices that trade, in the sense of buying, cannot exist except upon terms fixed by combinations of sellers.¹

§ 1298. "Trade" and "Commerce" Synonymous in the Statute.

In *United States v. Patterson*,¹ it was held that the words "trade" and "commerce" were synonymous as used in the statute, although the word "commerce" is in its usual sense a larger word than "trade" in its usual sense, and sometimes "commerce" is used to embrace less than "trade", and sometimes "trade" is used to embrace as much as "commerce."

§ 1299. "Monopoly" Defined.

In construing the statute, consideration of all monopolies which exist by legislative grant must be excluded; the word "monopolize" was not intended by the legislature to be used with reference to the acquisition of exclusive rights under government concession, but to mean "to aggregate" or "concentrate" in the hands of few, practically, and as a matter of fact, and according to the known results of human action, to the exclusion of others; to accomplish this end by what, in popular language, is expressed in the word "pooling", which may be defined to be an aggregation of property or capital belonging to different persons,

§ 1297. ¹ *United States v. United States Steel Corp.*, 223 Fed. 55, 177, affirmed by United States Supreme Court, March 1, 1920, three Justices

dissenting, — U. S. —, 64 L. ed. 222, — S. C. —.

§ 1298. ¹ 55 Fed. 605, 639.

with a view to common liabilities and profits. The expression in the title of the act "combination in the form of trust" would seem to point to just what, in popular language, is meant by pooling.¹ Congress did not, in declaring it a misdemeanor to "monopolize" or "attempt to monopolize", any part of the trade or commerce among the states or with foreign nations, attempt to prescribe limits to the acquisition, either by the private citizen or state corporations, of property which might become the subject of interstate commerce. The magnitude of a business, production, or manufacture is not the monopoly, or attempt to monopolize, which the statute condemns. A "monopoly", in the prohibited sense, involves the element of an exclusive privilege or grant which restrained others from the exercise of a right or liberty which they had before the monopoly was secured. In commercial law, it is the abuse of free commerce, by which one or more individuals have procured the advantage of selling alone or exclusively all of a particular kind of merchandise or commodity to the detriment of the public.²

§ 1300. Monopolizing through Combinations.

In the case of a monopoly brought about by monopolizing through a "combination by fusion" or "corporate combination", the monopolizing exists as long as the combination continues to exist. It can at any time be dissolved, and its constituent elements restored to existence. But in the case of a monopolizing by wrongful means the monopolizing ceases whenever the pugnacious competitor ceases to fight. It is not possible to resurrect the competitors who have been slain in the contest and restore to them what they have lost. Such competitor does not continue to monopolize, within the meaning of the statute, in holding on to the spoils of victory. It is never to be lost sight of that actually doing business, no matter how large, is not monopolizing. It is excluding from the opportunity of doing business that constitutes the offense. If it is thought that this is an evil condition of things, which should not be allowed to continue, the answer is

§ 1299. ¹ American Biscuit & Steel Corporation (Sup. Ct. U. S. Manf'g. Co. v. Klotz, 44 Fed. 721, March 1, 1920).
but see United States v. United States ² In re Greene, 52 Fed. 104, 115.

that things should not have been allowed to get in that condition. The competitors attacked should have called upon the court to protect them whilst they were being attacked.¹

§ 1301. Monopoly and Restraint of Trade.

A "monopoly", both at common law and under this statute, implies the control of goods or service which the public desires to obtain. An attempt to monopolize means an attempt to get control of the industry in which the defendant is engaged by means which prevent other men from engaging in fair competition with him. There may, it has been said, be an unreasonable restraint of trade which does not constitute a monopoly; though there can be no monopoly which does not constitute an unreasonable restraint of trade.¹

§ 1302. Monopoly Need not Be Complete.

The restraint in monopoly need not be complete in its results to constitute a violation of the act.¹ Section 2 renders it possible for one single person to be punished under this statute for either a monopoly or an attempt to monopolize, whereas it is difficult to imagine one person combining, and obviously one person cannot conspire.²

§ 1303. "Control" Equivalent to "Monopolize."

"Control" has been construed as the substantial equivalent to "monopolize" in determining the sufficiency of an indictment under Section 2.¹ To obtain a dominating interest or control in a competing corporation it is not necessary to prove that in fact more than one half of the stock was secured. A lesser amount may be sufficient to obtain this control.²

§ 1300. ¹ *Patterson v. United States*, 222 Fed. 599, 625, 138 C. C. A. 123 (6th Cir.).

§ 1301. ¹ *United States v. Whiting*, 212 Fed. 466, 478.

§ 1302. ¹ *United States v. E. C. Knight Co.*, 156 U. S. 1, 39 L. ed. 325, 15 S. C. 249; *Chesapeake & Ohio Fuel Co. v. United States*, 115 Fed. 610, 53 C. C. A. 256 (6th Cir.); *Bigelow v. Calumet & Hecla Mining Co.*, 167 Fed. 704; *United States v.*

MacAndrews & Forbes Co., 149 Fed. 823.

² *United States v. MacAndrews & Forbes Co.*, *supra*, but see *United States v. United States Steel Corporation* (U. S. Sup. Ct., March 1, 1920).

§ 1303. ¹ *Hood Rubber Co. v. United States Rubber Co.*, 229 Fed. 583.

² *United States v. Union Pacific R. R. Co.*, 226 U. S. 61, 95, 57 L.

§ 1304. Interstate Commerce — "Commerce" Defined.

Chief Justice Marshall defines Commerce as follows: "Commerce, undoubtedly, is traffic, but it is something more; it is intercourse. It describes the commercial intercourse between nations and parts of nations in all its branches, and is regulated by prescribing rules for carrying that intercourse." That which belongs to commerce is within the jurisdiction of the United States, but that which does not belong to commerce is within the jurisdiction of the police power of the State.¹

§ 1305. "Commerce."

The United States Supreme Court in dealing with interstate commerce has always held that that which was described as the object of commerce had to be something tangible, or "ideas, wishes, orders, and intelligence" transmitted across State borders.¹

§ 1306. "Articles of Interstate Commerce."

The fact that an article is manufactured for export to another State does not of itself make it an article of interstate commerce, and the intent of the manufacturer does not determine the time

ed. 124, 33 S. C. 53. For a discussion on what is considered INTERSTATE COMMERCE and what is INTRASTATE COMMERCE, see *Swift & Co. v. United States*, 196 U. S. 375, 397, 49 L. ed. 518, 524, 25 S. C. 276, reviewing *United States v. E. C. Knight Co.*, 156 U. S. 1, 39 L. ed. 325, 15 S. C. 249; *Montagu & Co. v. Lowry*, 193 U. S. 38, 48 L. ed. 608, 24 S. C. 307; *Hopkins v. United States*, 171 U. S. 578, 43 L. ed. 290, 19 S. C. 40; *Anderson v. United States*, 171 U. S. 604, 43 L. ed. 300, 19 S. C. 50. See also *United States v. Boyer*, 85 Fed. 425.

§ 1304. ¹ *Gibbons v. Ogden*, 9 Wheat. 1, 210, 6 L. ed. 23, 73; *Brown v. Maryland*, 12 Wheat. 419, 448, 6 L. ed. 678, 688; *Thurlow v. Massachusetts*, 5 How. 504, 599, 12 L. ed. 256, 299; *County of Mobile v. Kimball*,

102 U. S. 691, 26 L. ed. 238; *Bowman v. Chicago & Northwestern Ry. Co.*, 125 U. S. 465, 31 L. ed. 700, 8 S. C. 689, 1062; *Leisy v. Hardin*, 135 U. S. 100, 34 L. ed. 128, 10 S. C. 681; *In re Rahrer*, 140 U. S. 545, 555, 35 L. ed. 572, 574, 11 S. C. 865; Per Chief Justice Fuller in *United States v. E. C. Knight Co.*, 156 U. S. 1, 39 L. ed. 325, 329, 15 S. C. 249.

§ 1305. ¹ *Gibbons v. Ogden*, 9 Wheat. (U. S.) 1, 197, 6 L. ed. 23; *Western Union Telegraph Co. v. Pendleton*, 122 U. S. 347, 30 L. ed. 1187, 7 S. C. 1126; *Western Union Telegraph Co. v. James*, 162 U. S. 650, 654, 40 L. ed. 1105, 16 S. C. 934; *Lottery Case*, 188 U. S. 321, 352, 47 L. ed. 492, 23 S. C. 321; *Hammer v. Dagenhart*, 247 U. S. 251, 62 L. ed. 1101, 38 S. C. 529.

when the article or product passes from the control of the State and belongs to commerce.¹

§ 1307. "Combination."

A person or firm may of his or their own volition refuse to deal with another because of the trade practices of the latter, and be wholly within his or their rights. Notwithstanding this, a group or combination of firms may not obligate themselves not to deal with certain firms. An act harmless when done by one may become a public wrong when done by many, acting in concert, for it then takes on the form of a conspiracy, and may be prohibited or punished, if the result be hurtful to the public, or to the individual against whom the concerted action is directed.¹ Mr. Justice McKenna in discussing the Sherman Act and kindred statutes says: "According to them, competition, not combination, should be the law of trade. If there is evil in this, it is accepted as less than that which may result from the unification of interest, and the power such unification gives. And that legislatures may so ordain this court has decided."² The transfer to a holding company of the stock of two competing interstate railroads, thereby effectually destroying the power which had theretofore existed to compete in interstate commerce, is a restraint upon such commerce.³ Again, all the authorities agree that in order to vitiate a contract or combination it is not essential that its result should be a complete monopoly; it is sufficient if it really tends to that end and to deprive the public of the advantages which flow from free competition.⁴

§ 1306. ¹ Chief Justice Fuller in *United States v. Knight*, 156 U. S. 1, 39 L. ed. 325, 329, 15 S. C. 249, citing *Coe v. Errol*, 116 U. S. 517, 29 L. ed. 715, 6 S. C. 475; *Hammer v. Dagenhart*, 247 U. S. 251, 62 L. ed. 1101, 38 S. C. 529.

§ 1307. ¹ *Callan v. Wilson*, 127 U. S. 540, 555, 556, 32 L. ed. 223, 8 S. C. 1301; *Grenada Lumber Co. v. Mississippi*, 217 U. S. 433, 440, 441, 54 L. ed. 826, 30 S. C. 535.

² *National Cotton Oil Co. v. Texas*, 197 U. S. 115, 129, 49 L. ed. 689, 694, 25 S. C. 379, citing *United*

States v. E. C. Knight Co., 156 U. S. 1, 39 L. ed. 325, 15 S. C. 249; *United States v. Trans-Missouri Freight Assn.*, 166 U. S. 290, 41 L. ed. 1007, 17 S. C. 540; *United States v. Joint Traffic Assn.*, 171 U. S. 505, 43 L. ed. 259, 19 S. C. 25; *Northern Securities Co. v. United States*, 193 U. S. 197, 48 L. ed. 679, 24 S. C. 436; *Swift & Co. v. United States*, 196 U. S. 375, 49 L. ed. 518, 25 S. C. 276.

³ *Northern Securities Co. v. United States*, *supra*.

⁴ Chief Justice Fuller in *United States v. E. C. Knight Co.*, *supra*.

§ 1308. Rule of Reason.

Prior to the decision in the *Standard Oil Case*,¹ several cases held that the act covered any restriction of trade whatever, reasonable or unreasonable.² In the year 1906 the meaning and the scope of the Sherman Act came up for consideration before the United States Supreme Court in an important case known as the *Trans-Missouri Freight Case*.³ The question there was as to the validity under the Anti-Trust Act of a certain agreement between numerous railroad companies, whereby they formed an association for the purpose of establishing and maintaining rates, rules and regulations in respect of freight traffic over specific routes. Two questions were involved: First, whether the act applied to railroad carriers; second, whether the agreement the annulment of which as illegal was the basis of the suit which the United States brought. The court held that railroad carriers were embraced by the act. In determining that question, the court, among other things, said: "The language of the act includes every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States or with foreign nations. So far as the very terms of the statute go, they apply to *any* contract of the nature described. A contract therefore that is in restraint of trade or commerce is, by the strict language of the act, prohibited, even though such contract is entered into between competing common carriers by railroad, and only for the purposes of thereby affecting traffic rates for the transportation of persons and property. If such an agreement restrains trade or commerce, it is prohibited by the statute, unless it can be said that an agreement, no matter what its terms, relating only to transportation cannot restrain trade or commerce. We see no escape from the conclusion that if an agreement of such a nature does restrain it, the agreement is

§ 1308. ¹ *Standard Oil Co. v. United States*, 221 U. S. 1, 55 L. ed. 691, 31 S. C. 502.

² *United States v. Trans-Missouri Freight Assn.*, 166 U. S. 290, 41 L. ed. 1007, 17 S. C. 540; *United States v. Joint Traffic Assn.*, 171 U. S. 505, 43 L. ed. 259, 19 S. C. 25;

Addyston Pipe, etc. Co. v. United States, 175 U. S. 211, 44 L. ed. 136, 20 S. C. 96; *Chesapeake etc. Fuel Co. v. United States*, 115 Fed. 610, 53 C. C. A. 256 (6th Cir.).

³ 166 U. S. 290, 41 L. ed. 1007, 17 S. C. 540.

condemned by this act. . . . Nor is it for the substantial interests of the country that any one commodity should be within the sole power and subject to the sole will of one powerful combination of capital. Congress has, so far as its jurisdiction extends, prohibited *all* contracts or combinations in the form of trusts entered into for the purpose of restraining trade and commerce. . . . While the statute prohibits all combinations in the form of trusts or otherwise, the limitation is not confined to that form alone. *All combinations which are in restraint of trade or commerce are prohibited, whether in the form of trusts or in any other form whatever.*"⁴ The court then proceeded to consider the second of the above questions, saying: "The next question to be discussed is as to what is the true construction of the statute, assuming that it applies to common carriers by railroad. What is the meaning of the language as used in the statute, that 'every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States or with foreign nations, is hereby declared to be illegal?' Is it confined to a contract or combination which is only in unreasonable restraint of trade or commerce, or does it include what the language of the act plainly and in terms covers, all contracts of that nature? It is now with much amplification of argument urged that the statute, in declaring illegal every combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce, does not mean what the language used therein plainly imports, but that it only means to declare illegal any such contract which is in *unreasonable* restraint of trade, while leaving all others unaffected by the provisions of the act; that the common law meaning of the term 'contract in restraint of trade' includes only such contracts as are in *unreasonable* restraint of trade, and when that term is used in the Federal statute it is not intended to include all contracts in restraint of trade, but only those which are in unreasonable restraint thereof. . . . By the simple use of the term 'contract in restraint of trade', *all* contracts of that nature, whether valid or otherwise, would be included, and *not*

⁴ *United States v. Trans-Missouri Freight Assn.*, 166 U. S. 290, 312, 324, 326, 41 L. ed. 1007, 17 S. C. 540.

alone that kind of contract which was invalid and unenforceable as being in unreasonable restraint of trade. When, therefore, the body of an act pronounces as illegal every contract or combination in restraint of trade or commerce among the several States, etc., the plain and ordinary meaning of such language is not limited to that kind of contract alone which is in unreasonable restraint of trade, but *all* contracts are included in such language, and no exception or limitation can be added without placing in the act that which has been omitted by Congress. . . . If only that kind of contract which is in unreasonable restraint of trade be within the meaning of the statute, and declared therein to be illegal, it is at once apparent that the subject of what is a reasonable rate is attended with great uncertainty. . . . To say, therefore, that the act excludes agreements which are not in unreasonable restraint of trade, and which tend simply to keep up reasonable rates for transportation, is substantially to leave the question of unreasonableness to the companies themselves. . . . But assuming that agreements of this nature are not void at common law and that the various cases cited by the learned courts below show it, the answer to the statement of their validity now is to be found *in the terms of the statute* under consideration. . . . The arguments which have been addressed to us against the inclusion of all contracts in restraint of trade, as provided for by the language of the act, have been based upon the alleged presumption that Congress, notwithstanding the language of the act, could not have intended to embrace all contracts, but only such contracts as were in unreasonable restraint of trade. Under these circumstances we are, therefore, asked to hold that the act of Congress excepts contracts which are not in unreasonable restraint of trade, and which only keep rates up to a reasonable price, notwithstanding the language of the act makes no such exception. In other words, we are asked to read into the act *by way of judicial legislation an exception that is not placed there by the lawmaking branch of the Government*, and this is to be done upon the theory that the impolicy of such legislation is so clear that it cannot be supposed Congress intended the natural import of the language it used. This *we cannot and ought not to do*. . . . If the act ought to read, as contended for by defendants, *Congress is*

the body to amend it and not this court, by a process of judicial legislation wholly unjustifiable. Large numbers do not agree that the view taken by defendants is sound or true in substance, and Congress may and very probably did share in that belief in passing the act. The public policy of the Government is to be found *in its statutes*, and when they have not directly spoken, then in the decisions of the courts and the constant practice of the government officials; but when the lawmaking power speaks upon a particular subject, over which it has constitutional power to legislate, *public policy in such a case is what the statute enacts*. If the law prohibit any contract or combination in restraint of trade or commerce, a contract or combination made in violation of such law is void, whatever may have been theretofore decided by the courts to have been the public policy of the country on that subject. The conclusion which we have drawn from the examination above made into the question before us is that the Anti-Trust Act applies to railroads, and that it renders illegal *all* agreements which are *in restraint* of trade or commerce as we have above defined that expression, and the question then arises whether the agreement before us is of that nature." The point was again pressed in the Joint Traffic Case,⁵ which was a suit by the United States against more than thirty railroads to declare illegal a certain agreement between those companies. The case was decided against the United States in the lower courts, but on appeal the Supreme Court of the United States said: "Upon comparing that agreement (the one in the Joint Traffic Case, then under consideration, 171 U. S. 505) with the one set forth in the case of *United States v. Trans-Missouri Freight Association*, 166 U. S. 290, the great similarity between them suggests that a similar result should be reached in the two cases (p. 558). Learned counsel in the Joint Traffic Case urged a reconsideration of the question decided in the *Trans-Missouri Case*, contending that 'the decision in that case (the *Trans-Missouri Freight Case*) was quite plainly erroneous, that the consequences of such error were far reaching and disastrous, and clearly at war with justice and sound policy, and that the construction placed upon the Anti-Trust

⁵ *United States v. Joint Traffic Association*, ed. 259, 19 S. C. 25, decided in 171 U. S. 505, 43 L. 1908.

statute had been received by the public with surprise and alarm.' They suggested that the point made in the Joint Traffic Case as to the meaning and scope of the act might have been but was not made in the previous case. The court said (171 U. S. 559) that 'the report of the Trans-Missouri Case clearly shows not only that the point now taken *was* there urged upon the attention of the court, but it was then *intentionally* and *necessarily* decided.' The question whether the court should again consider the point decided in the Trans-Missouri Case, 171 U. S. 573, was disposed of in the most decisive language, as follows: 'Finally, we are asked to reconsider the question decided in the Trans-Missouri Case, and to retrace the steps taken therein, because of the plain error contained in the decision and the widespread alarm with which it was received and the serious consequences which have resulted, or may soon result, from the law as interpreted in that case. It is proper to remark that an application for a reconsideration of a question but lately decided by this court is usually based upon a statement that some of the arguments employed on the original hearing of the question have been overlooked or misunderstood, or that some controlling authority has been either misapplied by the court or passed over without discussion or notice. While this is not strictly an application for a rehearing in the same case, yet in substance it is the same thing. The court is asked to reconsider a question but just decided after a careful investigation of the matter involved. There have heretofore been in effect two arguments of precisely the same questions now before the court, and the same arguments were addressed to us on both those occasions. The report of the Trans-Missouri Case shows a dissenting opinion delivered in that case, and that the opinion was concurred in by three other members of the court. That opinion, it will be seen, gives with great force and ability the arguments against the decision which was finally arrived at by the court. It was after a full discussion of the questions involved and with the knowledge of the views entertained by the minority as expressed in the dissenting opinion, that the majority of the court came to the conclusion it did. Soon after the decision a petition for a rehearing of the case was made, supported by a printed argument in its favor, and pressed with

an earnestness and vigor and at a length which were certainly commensurate with the importance of the case. This court, *with care and deliberation* and also with a full appreciation of their importance, again considered the questions involved in its former decision. A majority of the court once more arrived at the conclusion it had first announced, and accordingly it denied the application. And now *for the third time* the same arguments are employed, and the court is again asked to recant its former opinion, and to decide the same question in direct opposition to the conclusion arrived at in the Trans-Missouri Case. The learned counsel while making the application frankly confess that the argument in opposition to the decision in the case above named has been so fully, so clearly and so forcibly presented in the dissenting opinion of Mr. Justice White (in the Freight Case) that it is hardly possible to add to it, nor is it necessary to repeat it. The fact that there was so close a division of opinion in this court when the matter was first under advisement, together with the different views taken by some of the judges of the lower courts, led us to the most careful and scrutinizing examination of the arguments advanced by both sides, and it was after such an examination that the majority of the court came to the conclusion it did. It is not now alleged that the court on the former occasion overlooked any argument for the respondents or misapplied any controlling authority. It is simply insisted that the court, notwithstanding the arguments for an opposite view, arrived at an erroneous result, which, for reasons already stated, ought to be reconsidered and reversed. *As we have twice already deliberately and earnestly considered the same arguments which are now for a third time pressed upon our attention*, it could hardly be expected that our opinion should now change from that already expressed."

§ 1309. The Change of the Rule as Announced in the Standard Oil and Tobacco Cases.

The Standard Oil and American Tobacco Cases for the first time expressly held that the act should be construed in the light of reason, and, as so construed, it prohibits all contracts and combinations which amount to an unreasonable or undue restraint

of trade in interstate commerce.¹ The opinions in both cases were written by Mr. Chief Justice White. They substantially hold that the Sherman Act was not aimed at every contract or conspiracy in restraint of trade, but was directed only against undue or unreasonable restraints or conspiracies of interstate and foreign commerce. If the contract or combination, applying the rule of reason, is not calculated to produce such a result, the transaction is not within the prohibition of the Sherman Act. Accordingly the Anti-trust statute leaves it "to be determined by the light of reason . . . in every given case, whether any particular act or contract was within the contemplation of the statute."² In other words, each and every given case must stand on its own facts. The decision of the majority of the Court was severely criticized in a dissenting opinion by the late Mr. Justice Harlan. He charged that the Court by introducing the rule of reason has in effect by judicial legislation destroyed the usefulness of the Act. Summarizing the meaning of the Act in the American Tobacco Case, the Supreme Court said: "Applying the rule of reason to the construction of the statute, it was held in the Standard Oil Case that as the words restraint of trade at common law and in the law of this country at the time of the adoption of the Anti-trust Act only embraced acts or contracts or agreements or combinations which operated to the prejudice of the public interests by unduly restricting competition or unduly obstructing the due course of trade or which, either because of their inherent nature or effect or because of the evident purpose of the acts, etc., injuriously restrained trade, that the words as used in the statute were designed to have and did have but a like significance. It was therefore pointed out that the statute did not forbid or restrain the power to make normal and usual contracts to further trade by resorting to all normal methods, whether by agreement or otherwise, to accomplish such purpose. In other words, it was held, not that acts which the statute prohibited could be removed from the control of its prohibitions by a finding that they were reasonable, but that the duty to interpret

§ 1309. ¹ *Standard Oil Co. v. American Tobacco Co.*, 221 U. S. 106, United States, 221 U. S. 1, 55 L. ed. 55 L. ed. 663, 31 S. C. 632.
691, 31 S. C. 502; *United States v.* ² 221 U. S. 64.

which inevitably arose from the general character of the term restraint of trade required that the words restraint of trade should be given a meaning which would not destroy the individual right to contract and render difficult if not impossible any movement of trade in the channels of interstate commerce — the free movement of which it was the purpose of the statute to protect.”³ The same principle was affirmed in other cases.⁴

§ 1310. Monopoly and the Rule of Reason.

In the usual meaning of the word, monopoly may be said to be the acquisition of something for oneself, and perhaps it would be applied most appropriately when the whole of a given trade is acquired. Practically, however, so extreme a case of control or acquisition is rare, and is not primarily contemplated by the act. The second section deals with the monopolizing, or attempting to monopolize, “any part” of the trade or commerce referred to. The act gives no answer to the question: At which point does a business become so large that the statute condemns it? Section 2 gives no help, for “any part”, if strictly construed, might range from a minute and inconsiderable fraction to a part just less than the whole. Therefore, “it seems plain that the Supreme Court was abundantly justified in turning to the rule of reason, and in holding that of necessity Congress must have been dealing with undue or unreasonable restraints of trade, whether such restraints take the form of monopolies in whole or in part, or of concerted action under any guise whatever.”¹ Under this statute there must be not only a restraint of trade, but an undue restraint.²

§ 1311. What Is Unreasonable Restraint of Trade?

“As Congress certainly did not intend to condemn the proper exercise of business zeal and energy, we must recur to the rule

³ *United States v. American Tobacco Co.*, 221 U. S. 106, 179, 55 L. ed. 663, 31 S. C. 632.

⁴ *Nash v. United States*, 229 U. S. 373, 57 L. ed. 1232, 33 S. C. 780; *Eastern States Ret. Lum. Dealers' Assn. v. United States*, 234 U. S. 600, 58 L. ed. 1490, 34 S. C. 951; *United States v. Reading Co.*, 226

U. S. 324, 369, 57 L. ed. 243, 33 S. C. 90; *United States v. International Harvester Co.*, 214 Fed. 987.

§ 1310. ¹ *United States v. Keystone Watch Case Co.*, 218 Fed. 502, 516.

² *United States v. Whiting*, 212 Fed. 466, 473; *United States v. Eastman Kodak Co.*, 226 Fed. 62.

of reason and ask — not merely what is restraint of trade, but what is unreasonable restraint of trade? On this subject we are certainly able to say some things with confidence. Competitors must not be oppressed or coerced; fraudulent or unfair or oppressive rivalry must not be pursued. And if these words are criticized as too general, we may reply that such generality is apparently unavoidable, as some recent legislation of Congress testifies, and, moreover, we may safely deny that the words are too vague for satisfactory use; for it must be remembered that the common agreement of moral opinion in the community furnishes an adequate guide to their practical meaning and their practical application. They are not likely to be misapprehended or misapplied. Then too prices must not be arbitrarily fixed or maintained. Ordinarily the play of the great prices that influence the market will determine prices, and these forces must be allowed to have their unhindered effect. And a corollary from this consideration is an artificial scarcity must not be produced, since the effect of such a scarcity is to raise prices to the consumer. Moreover, the public is also injured if quality be impaired, so that the old price buys a worse article, and other injuries are done, if the wages of the laborer be arbitrarily reduced, and if the price of raw material be artificially depressed. In the complexity of human affairs there may be other methods of unreasonably restraining trade, and these may be left for consideration as they are made to appear, but those already referred to are the methods that have usually been employed, and we need not enter the field of conjecture.”¹

§ 1312. How Is the Standard to Be Applied?

But when such a question comes to be considered, where is a court to find the standard of reason? It has been said that it must be found in the gradually accumulated results of general experience and observation, in the gathered wisdom of the community, for this is the product of a common and a prolonged effort by men who theorize and by practical men alike to deal as fairly, as justly, and as equitably as may be possible with situations that are often obscure and complicated, and of high importance to large classes, and to many individuals. Obviously a standard

§ 1311. ¹ *United States v. Keystone Watch Case Co.*, 218 Fed. 502, 518.

should have a true relation to the subject measured; and, since the inquiry here is whether in a given case trade is likely to be, or has actually been, unduly restrained, reason can answer the question only by going to the facts of life and drawing upon the accumulated store of knowledge.¹

§ 1313. Who Is to Apply the Standard of the Rule of Reason?

To say that a transaction is undue or unreasonable implies that it has been judged by a standard. But who is to apply the standard? The legislation of Congress does not attempt the task itself, and under our system of government the duty must of necessity be undertaken by the courts, who must judge each case according to its facts.¹ In applying the rule of reason laid down by the Supreme Court in the Standard Oil and American Tobacco cases, it has been said: "If the five companies which formed the International (Harvester Co.) had been small and their combination had been essential to enable them to compete with large corporations in the same line, then their uniting would, in the light of reason, not have been in restraint of trade, but in the furtherance of it; but when they constituted the largest manufacturers of their articles in America, if not in the world, and held jointly about 80 to 85 per cent. of the trade, and two at least of the companies forming the combination were prosperous, their combining was, when similarly viewed, an unreasonable restraint of trade."²

§ 1314. Intent.

Persons accused of violation of the Sherman Act cannot justify their act by the claim that they did not know that they were violating the law, for the defendants are presumed to know the law applicable to their acts or contemplated acts, and are presumed to intend the natural consequences of such acts.¹ Nevertheless, it must be conceded that since the "rule of reason" was injected into the Sherman Act, by the decisions of the Supreme

§ 1312. ¹ United States v. Key-stone Watch Case Co., 218 Fed. 502, 516.

§ 1313. ¹ United States v. Key-stone Watch Case Co., 218 Fed. 502, 516.

² United States v. International Harvester Co., 214 Fed. 987, 999, 1000.

§ 1314. ¹ United States v. Paterson, 201 Fed. 697, 715.

Court in the Standard Oil and Tobacco cases, little certainty exists as to the meaning of the act. No one can in advance of a decision by a court of last resort venture a definite opinion as to whether upon a given state of facts the act would be violated. This is due not only to the conflicting decisions but to the further fact that the Clayton Act and the Act creating the Federal Trades Commission have a direct bearing upon the construction of the Sherman Act. It is about time that the whole subject should undergo revision by Congress. If there is a monopoly in fact, then the question of intent is immaterial, but in the case of an attempt to create a monopoly the element of intent becomes essential.² An alleged intent may convert what on their face might be no more than ordinary acts of competition, or the small dishonesties of trade, into a conspiracy in restraint of trade within the meaning of the law.³ Of course, this fact calls for conscience and circumspection in prosecuting officers, lest by the unfounded charge of a wider purpose than the acts necessarily import they convert what at most would be small local offenses into crimes under the statutes of the United States.⁴ Whether a particular act, contract, or agreement was a reasonable and normal method in furtherance of trade and commerce may, in doubtful cases, turn upon the intent to be inferred from the extent of the control thereby secured over the commerce affected, as well as by the method which was used. Of course, if the necessary result is materially to restrain trade between the States, the intent with which the thing was done is of no consequence. But when there is only a probability, the intent to produce the consequences may become important.⁵ In *United States v. Motion Pictures Patent Co.*,⁶ it was held that the motives of the contracting parties, whether innocent or otherwise, do not determine the character of their act, and are foreign to the inquiry, because, "if, in the

² *United States v. Quaker Oats Co.*, 232 Fed. 499.

³ *Nash v. United States*, 229 U. S. 373, 378, 57 L. ed. 1232, 33 S. C. 78; *Swift v. United States*, 196 U. S. 375, 396, 49 L. ed. 518, 25 S. C. 276; *Loewe v. Lawlor*, 208 U. S. 274, 299, 52 L. ed. 488, 28 S. C. 301.

⁴ *Nash v. United States*, *supra*.

⁵ *United States v. Reading Co.*, 226 U. S. 324, 370, 57 L. ed. 243, 33 S. C. 90; *United States v. St. Louis Terminal Assn.*, 224 U. S. 384, 394, — L. ed. —, — S. C. —; *Swift & Co. v. United States*, 196 U. S. 375, 49 L. ed. 518, 25 S. C. 276.

⁶ 225 Fed. 800, 806, 808.

judgment of the law, a contract or coöperating agreement is such as to work an undue and unreasonable restraint of trade, and through such restraint to monopolize trade or any part of it, the judgment is one of condemnation, no matter how innocent or otherwise praiseworthy the motives of those who had part in it." The intent is the touchstone, not because of moral delinquency, but by reason of the probable persistence of the combination's course of conduct. As Mr. Justice Holmes, in *Swift v. United States*,⁷ says: "When that intent and the consequent dangerous probability exist, this statute, like many others and like the common law in some cases, directs itself against that dangerous probability as well as against the completed result." Similarly Mr. Chief Justice White, in *United States v. the Standard Oil case*,⁸ says: "We think no distinterested mind can survey the period in question without being irresistibly driven to the conclusion that the very genius for commercial development and organization which it would seem was manifested from the beginning soon begot an intent and purpose to exclude others, which was frequently manifested by acts and dealings wholly inconsistent with the theory that they were made with the single conception of advancing the development of business power by usual methods, but which, on the contrary, necessarily involved the intent, to drive others from the field and to exclude them from their right to trade, and thus accomplish the mastery which was the end in view." These expressions mean that where the intent is established to occupy the whole of an industry, and the intent is accompanied by some appropriate conduct, the competition has already ceased in the sense that the national will has directed. Persons actuated with a desire to monopolize the whole of an industry will try — indeed, are already trying — to keep out others, regardless of whether those others can compete efficiently or not. Their conduct constitutes a social evil, because the public is entitled to the free play of such industrial power and capacity as such outsiders may be able to develop.⁹ The prior decisions

⁷ 196 U. S. 375, 396, 49 L. ed. 518, 25 S. C. 276, 279.

⁸ 221 U. S. 1, 76, 55 L. ed. 619, 31 S. C. 502, 521.

⁹ *United States v. Corn Products*, 234 Fed. 964, 1012.

of the Supreme Court were all to the effect that the mere possession of an economic power, acquired by some form of combination, and capable, by its own variation in production, of changing and controlling price is illegal. It was held that it was not necessary in any view that the combination should exclude, or be able to exclude, all others; it was not necessary that its control should extend beyond such a period as is required to bring in new supply,¹⁰ for if "these were necessary conditions, there could, indeed, be no restraint of trade without patent or control of some natural source."¹¹ It was also held that when in this class of torts unlawful combinations or unlawful agreements necessarily operate to unduly restrain trade and inflict injury, questions of willful purpose or conscious design to violate the law and inflict injury have no place.¹² But in the very recent decision of the United States Supreme Court in *United States Steel Case*, decided March 1, 1920, the majority of the Court held in substance that it is immaterial what the original intent was and what the conspirators did prior to the commencement of the action against them, if they abandoned it after the commencement of the suit; the Court also held that the mere possession of power to monopolize is not of itself sufficient to authorize proceedings under the Sherman Act. Mr. Justice Day in his dissenting opinion, concurred in by Justices Clark and Pitney, expressed the belief that the decision of the majority of the Court in effect vitiated the entire anti-trust legislation. This dissent, when taken in connection with the dissenting opinion of the late Mr. Justice Harlan, in the *Standard Oil and Tobacco Cases*, has made the entire subject of restraint of trade in interstate and foreign commerce uncertain and embarrassing to the profession as well as to the public generally. It is the duty of Congress to revise the entire subject and combine in one act the Sherman, Clayton and the Federal Trade Commission Acts. As they stand now one overlaps, limits and overrides the other and no one can venture a definite opinion as to

¹⁰ *United States v. Patten*, 226 U. S. 525, 57 L. ed. 333, 33 S. C. 141, 44 L. R. A. (N. S.) 323.

¹¹ *United States v. Corn Products Refining Co.*, *supra*.

¹² *Addyston Pipe & Steel Co. v.*

United States, 175 U. S. 211, 214, 234, 44 L. ed. 136, 20 S. C. 96; *Northwestern Securities Co. v. United States*, 193 U. S. 197, 331, 48 L. ed. 679, 24 S. C. 436.

the meaning and effect of the various provisions of said acts. The courts have held that so far as intent is involved (that is, intent either to violate the law or thereby inflict injury) persons combining or contracting are presumed to have intended the necessary, natural and probable consequences of their acts and agreements, and if their effect is to unduly restrain interstate trade with consequent injury, then the combination is illegal and the participants are chargeable with the consequences and are liable for the damages resulting;¹³ that in every case it is important to consider the intent and purpose of the action complained of; for, while it is not necessary to a violation of the act to show affirmatively a specific intent to restrain commerce or create a monopoly, provided such restraint or such monopoly be the direct, immediate and necessary result of the combination,¹⁴ yet, where acts are not sufficient in themselves to produce a result which the law seeks to prevent — for instance, a monopoly — but require further acts in addition to the mere forces of nature in order to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen.¹⁵

§ 1315. Good Motives Immaterial.

As to the extent of the restraint of interstate commerce, it is sufficient if the evidence shows that it is substantial.¹ The test is not whether by alleged methods carried out in pursuance of a conspiracy some portion of interstate commerce is annihilated, but whether such commerce is substantially interfered with or restrained.² It is immaterial that the defendants' motives were of the best. Such matters might very properly be considered by Congress in determining the propriety of enacting proposed

¹³ *Bluefields S. S. Co. v. United Fruit Co.*, 243 Fed. 1, 14, 155 C. C. A. 531 (3d Cir.).

¹⁴ *United States v. Trans-Missouri Freight Assn.*, 166 U. S. 290, 341, 41 L. ed. 1007, 17 S. C. 540; *United States v. Joint Traffic Assn.*, 171 U. S. 505, 43 L. ed. 259, 19 S. C. 25; *Chesapeake & Ohio Fuel Co. v. United States*, 115 Fed. 610, 623, 55 C. C. A. 256.

¹⁵ *Swift & Co. v. United States*, *supra*; *Bigelow v. Calumet & Hecla Mining Co.*, 167 Fed. 704, 709.

§ 1315. ¹ *United States v. Hollis*, 246 Fed. 611, 624, *but see United States v. U. S. Steel Corp.* (U. S. Sup. Ct., March 1, 1920).

² *United States v. Hollis*, *supra*.

legislation. The sole inquiry is whether the facts disclosed make out a case within the statute already enacted.³ By purposely engaging in a conspiracy which necessarily and directly produces the result which the statute is designed to prevent, they are, in legal contemplation, chargeable with intending that result.⁴ Only such contracts and combinations are within the act as, by reason of intent or the inherent nature of the contemplated acts, prejudice the public interests by unduly restricting competition or unduly obstructing the course of trade.⁵ The mere form in which the assailed transactions are clothed is of no importance.⁶ The mere vastness of the amount of property acquired, or the number of corporations united, or the dominion and control of a certain industry is not of itself sufficient to bring a combination within the act. Wrongful purpose and illegal combination are essential elements and they must appear before a combination will be condemned.⁷

§ 1316. Indictments — Following Language of Statute Insufficient.

An indictment, following simply the language of the Act, would be wholly insufficient, for the reason that the words of the statute do not of themselves fully, directly, and clearly set forth all the elements necessary to constitute the offense intended to be punished. The several counts of the indictment must be tested, not by the general recitals and averments thereof, although in the words of the statute, but by the specific acts or particular facts which are alleged to have been actually done and committed by the accused. If the particular acts or facts charged do not, as a matter of law, constitute contracts, combinations, or conspiracy

³ *United States v. Hollis*, *supra*; *Sanitary Mfg. Co. v. United States*, 226 U. S. 20.

⁴ *United States v. Patten*, 226 U. S. 525, 543, 57 L. ed. 333, 342, 33 S. C. 141, *citing* *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 243, 44 L. ed. 136, 148, 20 S. C. 76; *United States v. Reading Co.*, 226 U. S. 324, 370, 57 L. ed. 243, 33 S. C. 90.

⁵ *United States v. American To-*

bacco Co., 221 U. S. 106, 55 L. ed. 663, 31 S. C. 632; *Standard Oil Co. v. United States*, 221 U. S. 1, 55 L. ed. 619, 31 S. C. 502.

⁶ *United States v. American Tobacco Co.*, 221 U. S. 106, 108, 55 L. ed. 663, 694, 31 S. C. 632.

⁷ *United States v. American Tobacco Co.*, 221 U. S. 106, 182, 183, 55 L. ed. 663, 31 S. C. 694; *Standard Oil Co. v. United States*, *supra*.

in restraint of trade and commerce among the several states, or a monopoly or attempt to monopolize any part of such trade or commerce, no amount of averments and allegations that the accused "engaged in a combination", or "made contracts in restraint" of such trade or commerce, or "monopolized" or "attempted to monopolize" the same, will avail to sustain the indictment. Whether the accused is charged with an offense is to be determined by the particular acts or facts set forth, and not by the conclusions of the pleader, although asserted in the words of the statute.¹ This statute is not one of the class where it is always sufficient to declare in the words of the enactment, as it does not set out all the elements of a crime. A contract or combination in restraint of trade may be not only not illegal, but praiseworthy; as, where parties attempt to engross the market by furnishing the best goods, or the cheapest. So that ordinarily a case cannot be made under the statute unless the means are shown to be illegal, and therefore it is ordinarily necessary to declare the means by which it is intended to engross or monopolize the market. And by the well-settled rules of pleading it is not sufficient to allege the means in general language, but, if it is claimed that the means used are illegal, enough must be set out to enable the court to see that they are so, and to enable the defense to properly prepare to meet the charge made against it. There must be alleged in the indictment that there was a purpose to restrain trade as implied in the common law expression, "contract in restraint of trade", analogous to the word "monopolize" in the second section. It must appear somewhere in the indictment that there was a conspiracy in restraint of trade by engrossing or monopolizing or grasping the market, and it is not sufficient simply to allege a purpose to drive certain competitors out of the field by violence, annoyance, intimidation, or otherwise.² It is never sufficient to allege that an act is illegal; the United States must allege something more which the court can

§ 1316. ¹ In *re* Greene, 52 Fed. 104, 111; *United States v. Reardon & Sons Co.*, 191 Fed. 454; *United States v. Whiting*, 212 Fed. 466. See also *Corey v. Independent Ice Co.*, 207 Fed. 459.

² *United States v. Patterson*, 55 Fed. 605, 638, 641, but see *United States v. Patterson*, 59 Fed. 280, 283, to the effect that it may be sufficient to use the words of the statute, and that the suggestion that

see on the face of the indictment is illegal if the facts are proved as alleged.³ It is essential in an indictment under the statute to descend to particulars, and not to rely on the words of the statute.⁴ Every fact necessary to constitute the offense cannot be charged, or necessarily implied, by following the words of the statute. These words themselves do not fully and directly, without any uncertainty or ambiguity, set forth all of the elements necessary to constitute the offense; therefore it is not sufficient to follow only the language of the statute. Since, under this statute, the act becomes illegal and an offense only from the means used to effect it, the indictment must state, where it is practicable, so much as will show its illegality and charge the accused with a substantial offense. The charge must contain a statement of facts constituting the offense, and a certain description of it.⁵ An indictment is not bad because it describes a conspiracy or a contract in restraint of trade and calls it a combination.⁶ Indictments in the cases in the footnote, alleging acts and means used, have been held sufficient.⁷

§ 1317. Insufficient Indictments.

An indictment under Section 2 merely averring that by means of the acts alleged the defendants had monopolized the manufacture and sale of distilled spirits, without stating that in so doing they had monopolized trade and commerce in distilled spirits among the several states or with foreign nations, is insufficient.¹ It is not sufficient to charge an unlawful intent, or to aver that a combination or a course of business is in restraint of

the statute is "not one of a class", etc., related to the particular proposition then under consideration.

³ *United States v. Winslow*, 195 Fed. 578, 582; *United States v. Reardon & Sons Co.*, *supra*; *United States v. Whiting*, *supra*.

⁴ *United States v. Cowell*, 243 Fed. 730.

⁵ *United States v. Nelson*, 52 Fed. 646. See also *United States v. American Naval Stores Co.*, 186 Fed. 592.

⁶ *United States v. Swift*, 188 Fed. 92, 98.

⁷ *John S. Steers v. United States*, 192 Fed. 1, 112 C. C. A. 423 (6th Cir.); *United States v. MacAndrews & Forbes Co.*, 149 Fed. 823; *United States v. American Naval Stores Co.*, *supra*; *United States v. Virginia-Carolina Chemical Co.*, 163 Fed. 66; *United States v. Cowell*, *supra*; *United States v. Rintelen*, 233 Fed. 793; *United States v. Patterson*, 201 Fed. 697, 719; *United States v. King*, 250 Fed. 908.

§ 1317. ¹ *United States v. Greenhut*, 50 Fed. 469.

trade, or a monopoly of trade, in order to charge a crime. Acts relied upon to make the offense must be stated.² A conspiracy to monopolize is a conspiracy to create a monopoly, and unless it appears from the indictment that the conspiracy charged, if successfully carried out, would have resulted in a monopoly, no violation of the statute is charged, and the indictment is insufficient.³ An indictment should set forth such a state of facts as to make it clear that a manufacturer, engaged in what was believed to be the lawful conduct of his business, has violated some known law, before he is haled into court to answer the charge of the commission of a crime. And an indictment is insufficient wherein no averment is made of any contract or agreement having been entered into whereby the defendant, the manufacturer, and his customers, bound themselves to enhance and maintain prices, further than is involved in the circumstances that the defendant manufacturer refused to sell to persons who would not resell at indicated prices, and that certain retailers made purchases on this condition, whereas, inferentially, others declined to do so. There was no charge that the retailers themselves entered into any combination or agreement with each other, or that the defendant acted other than with his customers individually.⁴ An indictment charging generally that the defendant, a manufacturer of soaps, entered into agreements with its customers, wholesale and retail dealers, not named or made defendants, to whom it sold its products, that its products would not be resold at retail other than at prices fixed by the defendant, but which did not aver that the names of its customers were unknown to the grand jury, or state any particular infraction of the law was held too general and indefinite. There should have been no difficulty, if such conditions existed, in naming some specific instance of the alleged combination and stating it in detail.⁵ An indictment under the Sherman Act must contain an allegation that the defendants acted under agreement with each other, for the agreement is an essential element of the crime.⁶

² *In re Corning* (United States v. Greenhut), 51 Fed. 205. 253 Fed. 522, 527, *affirmed* 250 U. S. 300, 63 L. ed. 570, 39 S. C. 465.

³ *United States v. Patten*, 187 Fed. 664, 672.

⁵ *United States v. Colgate*, *supra*.

⁴ *United States v. Colgate & Co.*, 513 Fed. 375. ⁶ *United States v. M. Riowaty & Sons*, 251 Fed. 375.

§ 1318. Overt Acts Need not be Charged.

Counts containing no averments of overt acts are not for that reason insufficient.¹ In a case under this statute it is not necessary to set out any overt act. Simply the combination or contract in any form in restraint of trade between the states or with foreign nations constitutes the offense, and it is only essential to charge the combination or contract.² The agreement being the crime, that must be charged, and nothing more. If the indictment relates the elements of the agreement in sufficiently clear terms, the defendants are informed of what they are required to meet. They need not be told what means or measures they had decided on to carry out their agreement, or that any act was done by any person in the execution of the agreement.³ An indictment alleging a conspiracy that the defendants "should" do certain things and that they did certain acts in carrying it out was held sufficiently to charge that the defendants entered into the conspiracy described.⁴ It is not necessary to allege or prove that the conspirators themselves were all traders.⁵

§ 1319. Time.

The combination is not a thing of the instant the minds of the agreeing parties have come to a completed understanding, either express or implied. The purpose thereof is an essential element as well, and this may contemplate that its operation shall extend over a period of time. While the parties are engaged in the operation of the design, or in carrying that into effect, they are transgressing the statute, they are still agreeing to the unlawful offense, and still cohering in the thing that the law condemns.

§ 1318. ¹ *United States v. Patten*, 187 Fed. 664, 667, *affirmed* 226 U. S. 525, 57 L. ed. 333, 33 S. C. 141, *citing* *United States v. Kissel*, 173 Fed. 823; *United States v. Patterson*, 55 Fed. 605; *United States v. Patterson*, 201 Fed. 697, 722 (*citing cases*); *United States v. MacAndrews & Forbes Co.*, 149 Fed. 823; *United States v. New Departure Mfg. Co.*, 204 Fed. 107, 111, *citing* *Patten & Kissel cases*.

² *Nash v. United States*, 229 U.

S. 373, 57 L. ed. 1232, 33 S. C. 780; *United States v. Rintelen*, 233 Fed. 793; *United States v. Cowell*, 243 Fed. 730; *United States v. Norris*, 255 Fed. 423; *Knauer v. United States*, 237 Fed. 8, 13, 150 C. C. A. 210 (8th Cir.).

³ *United States v. Norris*, *supra*.

⁴ *United States v. King*, 229 Fed. 275.

⁵ *Nash v. United States*, *supra*; *Loewe v. Lawlor*, 208 U. S. 274, 301, 52 L. ed. 488, 28 S. C. 301.

Thus the offense becomes a continuing one, and it is only necessary to allege that the parties were engaged in the unlawful combination or contract between specified dates. By such allegation the offenders are apprised of the time of their transgression.¹ An indictment alleging that the defendants continuously, during the period from July 1, 1907 to January 8, 1912, committed the unlawful acts specified, sufficiently alleged that an offense was committed within the three-year statute of limitations.² The condition or state of facts against which the statute is directed is a continuing condition, and maintaining that condition is necessarily a continuing offense, therefore, it is not necessary to assign in the indictment the precise time when the purpose or plan of the combination or attempted conspiracy was formed or devised.³

§ 1320. Charging Defendants Jointly.

A number of defendants may be charged jointly under Section 2.¹

§ 1321. Duplicity.

While a combination or conspiracy under the act, when once effected, may be continuous, yet only one contract or one conspiracy can properly be alleged in any one count.¹ Without intimating that under the act such a thing might be possible as an indictment being duplicitous for charging in one count a violation of two or more sections of the act, a charge in a single count of a conspiracy to violate two or more laws of the United States is not duplicitous. It accordingly follows that charging a conspiracy to violate more than one section of the act in a single count is not duplicitous.² An indictment is not bad for duplicity because it charges both a conspiracy in restraint of trade and an actual restraint of trade where it is clear that what the indictment charges is a conspiracy, and that the overt acts described in it are

§ 1319. ¹ United States *v.* Cowell, 243 Fed. 730.

² United States *v.* New Departure Mfg. Co., 204 Fed. 107, 114.

³ United States *v.* MacAndrews & Forbes Co., 149 Fed. 823, 830.

§ 1320. ¹ United States *v.* Mac-

Andrews & Forbes Co., 149 Fed. 823.

§ 1321. ¹ United States *v.* Winslow, 195 Fed. 578, 580.

² Knauer *v.* United States, 237 Fed. 8, 13, 150 C. C. A. 210 (8th Cir.).

alleged in support of that charge, and not as separate crimes.³ A combination in restraint of trade may design to accomplish its object in many different ways, and the enumeration of the various means adopted does not render the indictment bad for duplicity, as in charging a combination in restraint of trade in the purchase of live stock and also in the sale of fresh meat.⁴ Under Section 2 monopolizing and attempting to monopolize are two distinct and different offenses, and cannot be included in one count of an indictment. It is also important that the defendant should know whether the government will proceed to prove that the defendants monopolized or attempted to monopolize. A count including both is therefore bad for duplicity and for lack of certainty.⁵ A count charging a combination in restraint of trade, and then bringing in by reference all the material allegations of another count which charges a conspiracy in restraint of trade is no duplication as charging two substantive offenses; the references being only for the purpose of giving details of the offense charged.⁶ But this practice is subject to the fundamental rules of pleading that duplicates and repugnancies must be avoided.⁷ Although a count of an indictment charged a conspiracy against competitors who were named and was limited thereto, where its underlying thought was that there was a generic conspiracy against all competitors, and that this conspiracy took specific direction against the competitors named as they came into existence and continued against them as long as they remained in existence, the count charged a single conspiracy, and was not duplicitous.⁸ Where the offenses charged grew out of the same transactions, were of the same class, and each count charged a separate and distinct offense, they could be joined in one indictment; they resulted in only one monopoly, which, when established, was in its nature a continuous offense.⁹

³ *United States v. King*, 229 Fed. 275.

⁴ *United States v. Swift*, 188 Fed. 92, 97.

⁵ *United States v. American Naval Stores Co.*, 186 Fed. 592.

⁶ *United States v. Winslow*, *supra*; *United States v. Patten*, 187 Fed.

664, 673; *United States v. New Departure Mfg. Co.*, 204 Fed. 107.

⁷ *United States v. Winslow*, *supra*.

⁸ *Patterson v. United States*, 222 Fed. 599, 616, 138 C. C. A. 123 (6th Cir.).

⁹ *United States v. Patterson*, 201 Fed. 697, 726.

§ 1322. Consolidation of Indictments.

Where defendants were charged on separate indictments with a conspiracy to do acts in restraint of trade, in violation of the Sherman Act, and a conspiracy under Section 37 of the Criminal Code to violate Section 13 of that code, and both conspiracies were directed against the munitions trade of the United States with France, Russia, England, and Japan, the defendants' purpose being to prevent the shipment or transportation of munitions of war to such countries, either by destroying munition plants in the United States or destroying ships and railroads outside of the United States engaged in carrying munitions, it was held that, as there was an identity of parties and of subject matter, and both conspiracies were entered into in the same district, though the defendants were indicted under the Sherman Act for their conspiracy against munition plants in the United States, the indictments should be consolidated and tried together for convenience.¹

§ 1323. "Monopolize."

A conspiracy to monopolize is a conspiracy to create a monopoly, and unless it appears from the indictment that the conspiracy in question, if successfully carried out, would have resulted in a monopoly, no violation of the statute is charged.¹

§ 1324. Doubt as to Meaning Resolved against Prosecution.

The act is a stringent statute which is carried far when it is used as the basis of a criminal prosecution of persons for conspiring to monopolize by obtaining power over prices without charging any intention to exercise such power by fixing prices. And when such a prosecution is had, a court is not drawing refined distinctions nor insisting upon technicalities when it requires the indictment to charge clearly and unmistakably that the object of the conspiracy was to put such power of monopoly into the hands of the defendants acting collectively and not each for himself. Doubt as to the meaning of the indictment in such a case should be resolved against the government.¹

§ 1322. ¹ United States v. Bopp, 237 Fed. 283.

§ 1324. ¹ United States v. Patten, 187 Fed. 664, 673.

§ 1323. ¹ United States v. Patten, 187 Fed. 664, 672.

§ 1325. Where Allegation of Intent Unnecessary.

If the details of the conspiracy are alleged in the indictment an allegation of a specific intent to restrain the trade or commerce is not necessary, the conspirators being held to have intended the necessary and direct consequences of their acts.¹

§ 1326. Causes of Action under Sherman and Clayton Acts.

Where facts are set out in one cause of action which may be regarded as violations of both the Sherman Act and the Clayton Act, the defendants are entitled to have these commingled causes of action separately stated, so that they may better prepare for trial and have the advantage by demurrer of eliminating one from consideration if a demurrer should be sustained.¹

§ 1327. Sufficient Indictments.

An indictment for a violation of Section 1 was held sufficient which informed the defendants that many persons, corporations, etc., throughout the United States are engaged in the manufacture of the different articles and supplies mentioned therein, and with those articles were engaging in foreign trade and commerce, and that to hinder and restrain such trade and commerce was the particular purpose and object of the alleged conspiracy.¹ In charging an unlawful combination, conspiracy and monopoly as a result of joint action, an indictment charging the ultimate plan, the specific acts by which it was carried out, and that those specific acts were planned and executed by three groups of individuals, each member of each group acting for himself and every other member of the group, was held sufficiently definite.² An indictment which charged that the groups of individual defendants did what was alleged to be unlawful and managed and controlled the various corporations of which they were officers, and directed the corporate action was held sufficient.³ An officer or director of a corporation cannot protect himself behind the corporation where he is the actual, present and efficient actor, and an indict-

§ 1325. ¹ *United States v. Patten*, 226 U. S. 525, 543, 57 L. ed. 333, 33 S. C. 141.

§ 1326. ¹ *Baran v. Goodyear Tire & Rubber Co.*, 256 Fed. 570.

§ 1327. ¹ *United States v. Rintelen*, 233 Fed. 793.

² *United States v. Swift*, 188 Fed.

92, 98.

³ *Ibid.*

ment joining officers of various corporations and charging them as actors is sufficient.⁴

§ 1328. Bill of Particulars in a Prosecution under the Sherman Act.

While a bill of particulars cannot aid an indictment which lacks the statement of essential facts to constitute the offense sought to be charged, such a bill is appropriate where there is a good indictment, and the defendant desires to be more particularly informed as to matters that will aid him in his defense.¹ In conspiracy cases bills of particulars should be more readily granted on the theory that such bills tend to define the issues more clearly, and tend to expedite the trial and to promote justice.² In the recent case of *United States v. Sumatra Purchasing Corporation et al.*,³ which was an indictment for conspiracy to violate the Sherman Act against five corporations and fourteen individuals, a bill of particulars was ordered. Judge Julius M. Mayer, after remarking that a motion for a bill of particulars is always in the sound discretion of the court, reasoned the matter out thus: "There are often situations where a premature revelation may defeat or impede the Government in its proper pursuit of the guilt. On the other hand, there are situations where a clear and frank statement will reduce to its proper and simplest limits, what might otherwise be a confused controversy and thus, in the ultimate best interest of the Government, as well as out of fairness to a defendant, a prompt solution may be invited of what are more likely to be questions of law than of fact. It is suggested in the brief of counsel for the Government, that the trial of the indictment will take from four to six weeks. What the issues should be in a case of this kind seems clear enough and the prediction of so long a trial can be due only to the expectation that an enormous amount of detail, either by way of writing or conversations, is necessary in order to establish (1) the unlawful agreements and (2) the acts done in connection therewith. If, in a case of this

⁴ *United States v. Winslow*, 195 Fed. 578, 582.

§ 1328. ¹ *United States v. Rintelen*, 233 Fed. 793.

² *Patterson v. Corn Exchange of Buffalo, et al.*, 197 Fed. 686.

³ *United States District Court, Southern District of New York*, still unreported.

kind, the fundamental issues are not clearly defined at the outset, the trial judge may well be confronted with great difficulty in passing upon the admissibility of testimony; and the familiar promise to connect, although made in perfect good faith, may not be fulfilled with resultant embarrassment to the jury in the endeavor to exclude from its official mind that which its ears have heard. At the very bottom of indictments of this character is the agreement upon which the charge of unlawful conspiracy rests. That agreement is the offense and what that agreement is should be made absolutely clear. It is not impossible that a grand jury might regard as unlawful that which a court may find, as matter of law, not to be unlawful, as has been illustrated in reported cases. Such a situation is not unusual in the interpretation of statutes and acts done in alleged violation thereof, where those statutes seek to protect against what Congress has denounced as economic wrongs. Thus it is, therefore, that the allegation that defendants agree among themselves 'to eliminate all competition' in the purchase, shipment, importation and sale of Sumatra leaf tobacco, in and through the United States, while *prima facie* a statement of fact (amply sufficient for the purposes of an indictment), may really represent the conclusion of law or fact or both, of the grand jury and of the draftsman of the indictment. If the complained of agreement were described, it might or might not turn out to be an agreement 'to eliminate all competition.' On the argument, counsel stated that 'agreements' were referred to nine times in addition to those specifically incorporated in the indictments as Exhibits. Manifestly, defendants are entitled to know what these agreements are, of which the grand jury complains. It is immaterial that the defendants may have in their possession the documents which express the agreements or may know what it is that they orally agreed upon. The fact that defendants have such knowledge no longer precludes the granting of an order for a bill of particulars. The point is that defendants should be informed as to what accusation they must meet. *Non constat* when stated, the writings and conversations may not, as matter of law, show any such agreement as the indictments charge, notwithstanding the good faith with which it must be assumed the charges have been made. Perhaps

a simple illustration will show the difference between what, in a case like this, may be regarded as coming within the proper scope of a demand and what may not. If the defendants, at a meeting, made an oral agreement which the prosecution is of opinion is unlawful, then defendants are entitled to a statement of what that agreement is. If a defendant, in seeking to keep secret such an agreement, made an admission to a third person, that such an agreement had been made, obviously none of the defendants would be entitled to that information before the trial. To be more specific it will be noted that it is charged that the defendants agreed to enter into the contract marked Exhibit A and that when the Sumatra Tobacco Import Corporation was organized, it was to enter into separate contracts with defendants American Cigar Co. and General Cigar Co., Inc., the terms of which contracts, as agreed upon, were to be set forth in Exhibits B and C, and were knowingly to contain willful false statements. Defendants are entitled to know in what respects these statements were false but defendants are not entitled to know upon what third persons the Government relies to prove the falsity of these statements." In a supplemental memorandum filed in the same case, the same learned Judge said: "So-called anti-trust cases necessarily involve much detail but this is a practical world in which the personal equation cannot be entirely eliminated. By this I mean, that the more clearly and simply the issues can be developed, the more surely a jury is likely to arrive at a just verdict. Endless writings — many of which could probably be safely eliminated — tend to weary and confuse a jury. Besides, as heretofore pointed out, I think one of the difficulties with cases of this character, where the trial judge is called upon to pass on many questions of law, is in the failure to define, at the outset, with reasonable certainty, the points of controversy so that the judge may rule intelligently in the early stages of the trial, instead of possibly being compelled, through no fault of his own, to retrace his steps. On the other hand, to repeat, the prosecutor should not be called upon to furnish evidence, except in so far as so doing is an incident to a proper bill of particulars." Delay in filing a motion for a bill of particulars until after the case had twice been peremptorily set

for trial and continued may be sufficient ground for denying such motion.⁴

§ 1329. Immunity Statutes.

The following acts are applicable to interstate commerce matters including the Sherman and Clayton Acts. "No person shall be excused from attending and testifying or from producing books, papers, tariffs, contracts, agreements and documents before the Interstate Commerce Commission, or in obedience to the subpoena of the Commission, whether such subpoena be signed or issued by one or more Commissioners, or in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of the act of Congress, entitled 'An act to regulate commerce', approved February fourth, eighteen hundred and eighty-seven, or of any amendment thereof on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him, may tend to criminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise, before said Commission, or in obedience to its subpoena, or the subpoena of either of them, or in any such case or proceeding: Provided, That no person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying. Any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry, or to produce books, papers, tariffs, contracts, agreements and documents, if in his power to do so, in obedience to the subpoena or lawful requirement of the Commission shall be guilty of an offense and upon conviction thereof by a court of competent jurisdiction shall be punished by fine of not less than one hundred dollars nor more than five thousand dollars, or by imprisonment for not more than one year or by both such fine and imprisonment."¹ The Act of June 29, 1906,² provides: "All existing laws relating to the attendance of witnesses and the

⁴ *Knauer v. United States*, 237 Fed. 8, 14, 150 C. C. A. 210 (8th Cir.).

§ 1329. ¹ Act of Feb. 11, 1893, Chap. 83, 27 Stat. L. 443.

² Chap. 3591, § 9, 34 Stat. L. 595.

production of evidence and the compelling of testimony under the Act to regulate commerce and all Acts amendatory thereof shall apply to any and all proceedings and hearings under this Act.” The persistent agitation on the part of corporations that they be classed as natural persons to receive the benefit of the immunity statutes caused the passage of the Act of June 30, 1906, providing that the immunity shall apply only to natural persons and not to corporations. Said Act is as follows:³ “Under the immunity provisions in the Act entitled ‘An Act in relation to testimony before the Interstate Commerce Commission’, and so forth, approved February eleventh, eighteen hundred and ninety-three, in section six of the Act entitled ‘An Act to establish the Department of Commerce and Labor’, approved February fourteenth, nineteen hundred and three, and in the Act entitled ‘An Act to further regulate commerce with foreign nations and among the States’, approved February nineteenth, nineteen hundred and three, and in the Act entitled ‘An Act making appropriations for the legislative, executive, and judicial expenses of the Government for the fiscal year ending June thirtieth, nineteen hundred and four, and for other purposes’, approved February twenty-fifth, nineteen hundred and three, immunity shall extend only to a natural person who, in obedience to a subpoena, gives testimony under oath or produces evidence, documentary or otherwise, under oath.” The immunity statute of February 11, 1893,⁴ does not apply to a prosecution for violation of the Sherman Act so as to abrogate in relation thereto the Fifth Amendment to the Constitution.⁵ This Act, relating to evidence given in government investigations, was enacted to satisfy the requirement of the Fifth Amendment. It does so by affording the witness absolute immunity from future prosecution for any offense arising out of the transactions to which his testimony relates, and which might be aided, directly or indirectly, thereby so as to leave no ground on which his constitutional privilege may be revoked. While it operates as an act of general amnesty for all such offenses, it is not intended to be, and cannot be made a shield against prosecution for offenses committed after the

³ Act of June 30, 1906, Chap. 3920, 34 Stat. L. 798.

⁴ 27 Stat. L. 443.

⁵ *Foot v. Buchanan*, 113 Fed. 156.

testimony is given or the evidence furnished, since a person cannot be said to have been a witness against himself in respect to an offense which had not been committed when the testimony was given.⁶ Unless the privilege is asserted, the witness will be given no immunity, and, should he testify after the denial of the privilege, then only can he say that his evidence has been compulsorily furnished, and that, therefore, he is entitled to immunity.⁷ The Act of February 19, 1903,⁸ is as follows: "Whenever the Interstate Commerce Commission shall have reasonable ground for belief that any common carrier is engaged in the carriage of passengers or freight traffic between given points at less than the published rates on file, or is committing any discriminations forbidden by law, a petition may be presented alleging such facts to the (circuit court) of the United States sitting in equity having jurisdiction; and when the act complained of is alleged to have been committed or as being committed in part in more than one judicial district or State, it may be dealt with, inquired of, tried and determined in either such judicial district or State, whereupon it shall be the duty of the court summarily to inquire into the circumstances, upon such notice, and in such manner as the court shall direct and without the formal pleadings and proceedings applicable to ordinary suits in equity, and to make such other persons or corporations parties thereto as the court may deem necessary, and upon being satisfied of the truth of the allegations of said petition said court shall enforce an observance of the published tariffs or direct and require a discontinuance of such discrimination by proper orders, writs and process, which said orders, writs and process may be enforceable as well against the parties interested in the traffic as against the carrier, subject to the right of appeal as now provided by law. It shall be the duty of the several district attorneys of the United States whenever the Attorney-General shall direct, either of his own motion or upon the request of the Interstate Commerce Commission, to institute and prosecute such proceedings, and the proceedings provided for by this Act shall not preclude the bringing of suit

⁶ *United States v. Swift*, 186 Fed. 1002, 1017.

⁷ *United States v. Elton*, 222 Fed. 428, 436.

⁸ Chap. 708, § 3, 32 Stat. L. 848.

for the recovery of damages by any party injured, or any other action provided by said Act approved February fourth, eighteen hundred and eighty-seven, entitled An Act to regulate commerce and the Acts amendatory thereof. And in proceedings under this Act and the Acts to regulate commerce the said courts shall have the power to compel the attendance of witnesses, both upon the part of the carrier and the shipper, who shall be required to answer on all subjects relating directly or indirectly to the matter in controversy, and to compel the production of all books and papers, both of the carrier and the shipper, which relate directly or indirectly to such transaction; the claim that such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such person from testifying or such corporation producing its books and papers, but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify or produce evidence documentary or otherwise in such proceeding: Provided, That the provisions of an Act entitled 'An Act to expedite the hearing and determination of suits in equity pending or hereafter brought under the Act of July second, eighteen hundred and ninety, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", "An Act to regulate commerce", approved February fourth, eighteen hundred and eighty-seven, or any other Acts having a like purpose that may be hereafter enacted, approved February eleventh, nineteen hundred and three', shall apply to any case prosecuted under the direction of the Attorney-General in the name of the Interstate Commerce Commission."

The Act of February 19, 1903,⁹ to further regulate commerce with foreign nations and among the States, § 3, closing paragraph, enacts, "*Provided*, That the provisions of an act entitled 'An Act to expedite the hearing and determination of suits in equity pending or hereafter brought under the act of July second, eighteen hundred and ninety, entitled "An act to protect trade and commerce against unlawful restraints and monopolies", "An act to regulate commerce", approved February fourth, eighteen hundred and eighty-seven, or any other acts having a like purpose that

⁹ Comp. Stat. of 1901, Sup. for 1903, p. 365.

may be hereafter enacted, approved February eleventh, nineteen hundred and three', shall apply to any case prosecuted under the direction of the Attorney-General in the name of the Interstate Commerce Commission." The second section of the act of February 11, 1903,¹⁰ provides: "That in every suit in equity pending or hereafter brought in any Circuit Court of the United States under any of said acts (having reference to the anti-trust act of 1890 and the act to regulate commerce mentioned in the preceding section) wherein the United States is complainant, including cases submitted but not yet decided, an appeal from the final decree of the Circuit Court will lie only to the Supreme Court and must be taken within sixty days from the entry thereof."¹¹ An inquisition before a grand jury to determine supposed violations of the Sherman Act is a "proceeding" within the Act of February 19, 1903,¹² providing that no person shall be prosecuted or subjected to any penalty for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence in any "proceeding" under the Sherman Act and other acts therein mentioned.¹³ The Act of February 25, 1903,¹⁴ provides: "For the enforcement of the provisions of the Act entitled 'An Act to regulate commerce', approved February fourth, eighteen hundred and eighty-seven, and all Acts amendatory thereof or supplemental thereto, and of the Act entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies', approved July second, eighteen hundred and ninety, and all Acts amendatory thereof or supplemental thereto, and sections seventy-three, seventy-four, seventy-five, and seventy-six of the Act entitled 'An Act to reduce taxation, to provide revenue for the Government, and other purposes', approved August twenty-seventh, eighteen hundred and ninety-four, the sum of five hundred thousand dollars, to be immediately available, is hereby appropriated out of any money in the Treasury not heretofore appropriated, to be expended under the direction

¹⁰ Comp. Stat. of 1901, Sup. for 1903, p. 376.

¹¹ Interstate Commerce Commission v. Baird, 194 U. S. 25, 35, 48 L. ed. 860, 24 S. C. 563.

¹² Chap. 708, 32 Stat. L. 848.

¹³ In re Hale, 139 Fed. 496; Hale v. Henkel, 201 U. S. 43, 66, 50 L. ed. 652, 26 S. C. 370.

¹⁴ Chap. 755, § 1, 32 Stat. L. 904.

of the Attorney-General in the employment of special counsel and agents of the Department of Justice to conduct proceedings, suits and prosecutions under said Acts in the courts of the United States: Provided, That no person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit, or prosecution under said Acts: Provided further, That no person so testifying shall be exempt from prosecution or punishment for perjury committed in so testifying." The appropriation act of February 25, 1903,¹⁵ making provision for the enforcement of the Interstate Commerce and Anti-trust Acts, contains a similar immunity provision relating to persons giving testimony or producing evidence in any proceeding, suit or prosecution under these laws.¹⁶ The right of a witness to claim his privilege against self-crimination, afforded by the Fifth Amendment, when examined concerning an alleged violation of the Sherman Act, is taken away by this proviso, which furnishes a sufficient immunity from prosecution to satisfy the constitutional guaranty, although it may not afford immunity from prosecution in the state courts for the defense disclosed.¹⁷ Testimony given by an officer of a corporation before a grand jury investigating alleged violations of the Sherman Act by the corporation, consisting of statements of facts shown by the corporation's records produced by him on a subpoena *duces tecum*, does not entitle him to immunity from prosecution for an offense against the United States committed in his official capacity, but which has no connection with the matter then being investigated, under the said Immunity Act of February 25, 1903.¹⁸ The Act of February 14, 1903,¹⁹ provides: "All the requirements, obligations, liabilities, and immunities imposed or conferred by said 'Act to regulate commerce', and by 'An act in relation to testimony before the Interstate Commerce Commission', and so forth, approved February eleventh, eighteen hundred and ninety-three, supple-

¹⁵ 32 Stat. L. 904.

U. S. 92, 50 L. ed. 673, 26 S. C.

¹⁶ United States v. Armour & Co.,

358.

142 Fed. 808.

¹⁸ Heike v. United States, 192¹⁷ Hale v. Henkel, *supra*. See

Fed. 83, 112 C. C. A. 615 (2d Cir.).

also Nelson v. United States, 201

¹⁹ Chap. 552, § 6, 32 Stat. L. 827.

mental to said 'Act to regulate commerce'; shall also apply to all persons who may be subpoenaed to testify as witnesses or to produce documentary evidence in pursuance of the authority conferred by this section." Section 6 of the Commerce and Labor Act of February 14, 1903,²⁰ contemplates that the Commissioner of Corporations shall proceed by private hearings; and a person who appears before him on his demand or by his request and gives testimony or produces documents, although not sworn, is entitled to the same privileges and immunities as though his attendance was compelled by subpoena and his testimony given under oath.²¹ The fact that a person produces documentary evidence in a proceeding under the Sherman Act will not give that person immunity from a prosecution under the revenue acts where it appears that the subject matter is wholly different and the testimony adduced consisted of a summary of what the books of the corporation showed as to the formation of another corporation and identified his signature to certain checks in a transaction not involved in the present prosecution.²² Whether a civil action under the Sherman Act should be stayed pending the trial of a criminal prosecution for an identical act is within the discretion of the Court.²³

§ 1330. Defenses.

It is no defense to a prosecution for combination or conspiracy in restraint of trade that the field is open to other persons to go into the same business. The business situation must be taken as it is.¹ Whatever may be the views of individual economists, under the federal statutory policy normal and healthy competition is the law of trade, and such evils as may result from such competition must be considered less than those liable to follow a complete unification of interests and the power such unification gives. The evil of unification lies in the temptation to higher rates and lessened regard for the public interests, and the tend-

²⁰ Chap. 552, § 6, 32 Stat. L. 827.

²¹ *United States v. Armour & Co.*,
supra.

²² *Heike v. United States*, 227
U. S. 131, 57 L. ed. 450, 33 S. C. 226.

²³ *Standard Sanitary Mfg. Co.*

v. United States, 226 U. S. 20, 57
L. ed. 107, 33 S. C. 9.

§ 1330. ¹ *United States v. King*,
250 Fed. 908, *but see* *United States*
v. United States Steel Corp. (U. S.
Sup. Ct., March 1, 1920).

ency to this evil result must be recognized, even though not in a given case yet realized in actual experience. Even competitive practices, of a nature which as between business rivals standing practically on equal terms may be normal and lawful, yet when employed by a powerful monopolistic combination with the ability to crush, and for the purpose of crushing, a weak rival, may become abnormal and unlawful.² The fact that other persons, not members of the association alleged to be illegal, may engage in the same business and not be subject to the rules of the association, is no defense to a prosecution under the Sherman Act.³ The fact that the purchase of the stock of another competing railroad was legal in the State where made, and within corporate powers conferred by State authority, constitutes no defense in a prosecution under the Sherman Act, if it contravenes the provisions of said Act.⁴ It is no justification of an illegal monopoly to assert that it had reduced the price of an article produced by it, as this may have been done simply to injure a rival.⁵ An agreement to increase prices and decrease protection is within the act.⁶

§ 1331. Time — Denial of Allegation under Plea of Not Guilty.

As a conspiracy may have continuance in time, where the indictment, consistently with other facts, alleges that it did so continue to the date of filing, that allegation must be denied under the general issue, and not by a special plea.¹

§ 1332. Severance.

Where enough appears to justify the view that the questions to be presented at the trial of directors who have joined the board of the corporation after discontinuance of a prior suit against the corporation for violation of the act will probably be materially different from those which will be involved in the trial

² United States v. Union Pacific R. R. Co., 226 U. S. 61, 57 L. ed. 124, 33 S. C. 53; United States v. Joint Traffic Association, 171 U. S. 505, 43 L. ed. 259, 19 S. C. 25; United States v. Great Lakes Towing Co., 208 Fed. 733, 744.

³ United States v. King, *supra*.

⁴ United States v. Union Pacific R. Co., 226 U. S. 61, 86, 57 L. ed.

124, 133, 33 S. C. 53, citing authorities.

⁵ United States v. Eastman Kodak Co., 226 Fed. 62, 79.

⁶ United States v. American Column and Lumber Co., 263 Fed. 147.

§ 1331. ¹ United States v. Kissel, 218 U. S. 601, 610, 54 L. ed. 1168, 31 S. C. 124.

of the other defendants, with whom they have been jointly charged, and that possible serious antagonism between the positions of defense might arise, the directors who had joined the board after the discontinuance are entitled to a separate trial.¹

§ 1333. Effect of Lapse of Time and Changed Conditions.

In determining whether a combination restrains interstate commerce injuriously to the public, the chief inquiry is whether the interests brought together were competitive.¹ Lapse of time may not condone the offense of unlawful combination, if that exists. It may, however, create the offense and be an element in the refutation of accusations long deferred, or determine against particular remedies.²

§ 1334. Dissolution Pending Appeal.

As the interest of the public is to be protected, it was held that, although the defendant succeeded in the court below and the Government appealed from such judgment, and the defendant thereafter agreed to comply with the Government's request to dissolve the combination complained of, it would not be good ground for dismissing the appeal. In so holding Mr. Justice Peckham made the following observations:¹ "The defendants having succeeded in the court below, it would only be necessary thereafter to dissolve their association and instantly form another of a similar kind, and the fact of the dissolution would prevent an appeal to this court or procure its dismissal if taken. This result does not and ought not to follow. Although the general rule is that equity does not interfere simply to restrain a possible future violation of law, yet where parties have entered into an illegal agreement and are acting under it, and there is no adequate remedy at law and the jurisdiction of the court has attached by the filing of a bill to restrain such or any like action under a similar agreement, and a trial has been had, and judgment entered, the appellate jurisdiction of this court is not ousted by a simple

§ 1332. ¹ *United States v. Rockefeller*, 222 Fed. 534, and see § 180 in Vol. I.

§ 1333. ¹ *United States v. United Shoe Machinery Co.*, 247 U. S. 32, 62 L. ed. 968, 38 S. C. 473.

² *Ibid.*

§ 1334. ¹ *United States v. Trans-Missouri Freight Association*, 166 U. S. 290, 309, 41 L. ed. 1007, 17 S. C. 540.

dissolution of the association, effected subsequently to the entry of judgment in the suit. Private parties may settle their controversies at any time, and rights which a plaintiff may have had at the time of the commencement of the action may terminate before judgment is obtained or while the case is on appeal, and in any such case the court, being informed of the facts, will proceed no further in the action. Here, however, there has been no extinguishment of the rights (whatever they are) of the public, the enforcement of which the Government has endeavored to procure by a judgment of a court under the provisions of the act of Congress above cited. The defendants cannot foreclose those rights nor prevent the assertion thereof by the Government as a substantial trustee for the public under the act of Congress, by any such action as has been taken in this case. By designating the agreement in question as illegal and the alleged combination as an unlawful one, we simply mean to say that such is the character of the agreement as claimed by the Government. That question the Government has the right to bring before the court and obtain its judgment thereon." A decision of a district court on demurrer that the averments of an indictment charging violations of the act were not sufficient to connect the individual defendants with the offense charged, is a construction of the indictment, and not reviewable in the Supreme Court at the instance of the Government.²

§ 1335. Evidence — Sufficiency.

The proof needed to show some agreement resulting in a combination or conspiracy is necessarily difficult to obtain by direct testimony, and may be inferred from the things actually done.¹ In the *Boyd* case,² Judge Hough said: "Much evidence is necessary to decide whether the facts warrant any decision based on the Sherman Act." But this remark may be regarded as *obiter*

² *United States v. Pacific & Arctic Ry. & Nav. Co.*, 228 U. S. 87, 57 L. ed. 742, 33 S. C. 443; *United States v. Winslow*, 227 U. S. 202, 217, 57 L. ed. 481, 33 S. C. 253; *United States v. Patten*, 226 U. S. 525, 57 L. ed. 333, 33 S. C. 141, and *see also* Appeals by Government under Government Appeals Act.

§ 1335. ¹ *Eastern States Ret. Lumber Dealers' Assn. v. United States*, 234 U. S. 600, 58 L. ed. 1490, 34 S. C. 951.

² *Boyd v. New York and Harlem R. R. Co.*, 220 Fed. 174, 181.

dictum. Instructions to a jury to consider all the means of causing the monopoly complained of as charged in the indictment and then instructing them that they may convict on any one of the means if it is proved beyond a reasonable doubt, is reversible error. Especially is this so when one of the means charged was false gauging and the false raising of the grades of the article dealt in. Taken with other evidence, if it was shown to be systematic, it would have had a tendency to show the scheme alleged. But taken by itself, as the jury might have taken it under the instructions, it showed only cheating, and could not warrant a finding of the conspiracy in restraint of trade and commerce, with which the defendants were charged.³ Evidence showing an agreement to distribute reports, to increase prices and decrease production was held to be sufficient.⁴ A verdict of conviction must be supported by substantial evidence.⁵

§ 1336. Effect of Former Conviction or Acquittal.

The fact that conspiracies generally may be, and usually are, continuing agreements or undertakings, is true of conspiracies to restrain or monopolize commerce. Restraint or monopolization of commerce for a moment or a day is not the object of a conspiracy to restrain or monopolize it. The conspirators seek continuous restraint and monopolization. After conviction of a conspiracy no further prosecution can be had for the same offense, but the continued operation of the unlawful combination, notwithstanding a former conviction or acquittal thereof, is in itself a new violation of the law.¹

§ 1337. Removal of Defendant.

On application for an order of removal under Section 1014 of the Revised Statutes, the district court or judge may properly look into the indictment to ascertain whether an offense against the United States is charged, and whether the court to which the accused is sought to be removed has jurisdiction of the same.¹

³ *Nash v. United States*, 229 U. S. 373, 57 L. ed. 1232, 33 S. C. 780.

⁴ *United States v. American Column and Lumber Co.*, 263 Fed. 147.

⁵ *Humes v. United States*, 170 U. S. 210, 42 L. ed. 1011, 18 S. C. 602;

Seebach v. United States, 262 Fed. 886, — C. C. A. — (8th Cir.).

§ 1336. ¹ *United States v. Swift*, 186 Fed. 1002, 1005, and see Chapter XII in Vol. I.

§ 1337. ¹ *In re Greene*, 52 Fed. 104.

CLAYTON ACT, OCTOBER 15, 1914 (ANTI-TRUST ACT)

§ 1338. The Sherman Act as Affected by the Clayton Act — Text of the Clayton Act.

On October 15, 1914, Congress passed an additional statute entitled :

Chap. 323. — An Act To supplement existing laws against unlawful restraints and monopolies, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That "antitrust laws", as used herein, includes the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", approved July second, eighteen hundred and ninety; sections seventy-three to seventy-seven, inclusive, of an Act entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes", of August twenty-seventh, eighteen hundred and ninety-four; an Act entitled "An Act to amend sections seventy-three and seventy-six of the Act of August twenty-seventh, eighteen hundred and ninety-four entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes' ", approved February twelfth, nineteen hundred and thirteen; and also this Act.

"Commerce", as used herein, means trade or commerce among the several States and with foreign nations, or between the District of Columbia or any Territory of the United States and any State, Territory, or foreign nation, or between any insular possessions or other places under the jurisdiction of the United States, or between any such possession or place and any State or Territory of the United States or the District of Columbia or any foreign nation, or within the District of Columbia or any Territory or any insular possession or other place under the jurisdiction of the United States: *Provided*, That nothing in this Act contained shall apply to the Philippine Islands.

The word "person" or "persons" wherever used in this Act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

SEC. 2. That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly to discriminate in price between different purchasers of commodities, which commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce: *Provided*, That nothing herein contained shall prevent discrimination in price between purchasers of commodities on account of differences in the grade, quality, or quantity of the commodity sold, or that makes only due allowance for difference in the cost of selling or transportation, or discrimination in price in the same or different communities made in good faith to meet competition: *And provided further*, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade.

SEC. 3. That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented, for use, consumption or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

SEC. 4. That any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the

United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

SEC. 5. That a final judgment or decree hereafter rendered in any criminal prosecution or in any suit or proceeding in equity brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be *prima facie* evidence against such defendant in any suit or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided*, This section shall not apply to consent judgments or decrees entered before any testimony has been taken: *Provided further*, This section shall not apply to consent judgments or decrees rendered in criminal proceedings or suits in equity, now pending, in which the taking of testimony has been commenced but has not been concluded, provided such judgments or decrees are rendered before any further testimony is taken.

Whenever any suit or proceeding in equity or criminal prosecution is instituted by the United States to prevent, restrain or punish violations of any of the antitrust laws, the running of the statute of limitations in respect of each and every private right of action arising under said laws and based in whole or in part on any matter complained of in said suit or proceeding shall be suspended during the pendency thereof.

SEC. 6. That the labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

SEC. 7. That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.

No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of two or more corporations engaged in commerce where the effect of such acquisition, or the use of such stock by the voting or granting of proxies or otherwise, may be to substantially lessen competition between such corporations, or any of them, whose stock or other share capital is so acquired, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.

This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation engaged in commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition.

Nor shall anything herein contained be construed to prohibit any common carrier subject to the laws to regulate commerce from aiding in the construction of branches or short lines so located as to become feeders to the main line of the company so aiding in such construction or from acquiring or owning all or any part of the stock of such branch lines, nor to prevent any such common carrier from acquiring and owning all or any part of the stock of a branch or short line constructed by an independent company where there is no substantial competition between the company owning the branch line so constructed and the

company owning the main line acquiring the property or an interest therein, nor to prevent such common carrier from extending any of its lines through the medium of the acquisition of stock or otherwise of any other such common carrier where there is no substantial competition between the company extending its lines and the company whose stock, property, or an interest therein is so acquired.

Nothing contained in this section shall be held to affect or impair any right heretofore legally acquired: *Provided*, That nothing in this section shall be held or construed to authorize or make lawful anything heretofore prohibited or made illegal by the antitrust laws, nor to exempt any person from the penal provisions thereof or the civil remedies therein provided.

SEC. 8. That from and after two years from the date of the approval of this Act no person shall at the same time be a director or other officer or employee of more than one bank, banking association or trust company, organized or operating under the laws of the United States, either of which has deposits, capital, surplus, and undivided profits aggregating more than \$5,000,000; and no private banker or person who is a director in any bank or trust company, organized and operating under the laws of a State, having deposits, capital, surplus, and undivided profits aggregating more than \$5,000,000, shall be eligible to be a director in any bank or banking association organized or operating under the laws of the United States. The eligibility of a director, officer, or employee under the foregoing provisions shall be determined by the average amount of deposits, capital, surplus, and undivided profits as shown in the official statements of such bank, banking association, or trust company filed as provided by law during the fiscal year next preceding the date set for the annual election of directors, and when a director, officer, or employee has been elected or selected in accordance with the provisions of this Act it shall be lawful for him to continue as such for one year thereafter under said election or employment.

No bank, banking association or trust company, organized or operating under the laws of the United States, in any city or incorporated town or village of more than two hundred thousand inhabitants, as shown by the last preced-

ing decennial census of the United States, shall have as a director or other officer or employee any private banker or any director or other officer or employee of any other bank, banking association or trust company located in the same place: *Provided*, That nothing in this section shall apply to mutual savings banks not having a capital stock represented by shares: *Provided further*, That a director or other officer or employee of such bank, banking association, or trust company may be a director or other officer or employee of not more than one other bank or trust company organized under the laws of the United States or any State where the entire capital stock of one is owned by stockholders in the other: *And further provided*, That nothing contained in this section shall forbid a director of class A of a Federal reserve bank, as defined in the Federal Reserve Act, from being an officer or director or both an officer and director in one member bank.

That from and after two years from the date of the approval of this Act no person at the same time shall be a director in any two or more corporations, any one of which has capital, surplus, and undivided profits aggregating more than \$1,000,000, engaged in whole or in part in commerce, other than banks, banking associations, trust companies and common carriers subject to the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, if such corporations are or shall have been theretofore, by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws. The eligibility of a director under the foregoing provision shall be determined by the aggregate amount of the capital, surplus, and undivided profits, exclusive of dividends declared but not paid to stockholders, at the end of the fiscal year of said corporation next preceding the election of directors, and when a director has been elected in accordance with the provisions of this Act it shall be lawful for him to continue as such for one year thereafter.

When any person elected or chosen as a director or officer or selected as an employee of any bank or other corporation subject to the provisions of this Act is eligible at the time

of his election or selection to act for such bank or other corporation in such capacity his eligibility to act in such capacity shall not be affected and he shall not become or be deemed amenable to any of the provisions hereof by reason of any change in the affairs of such bank or other corporation from whatsoever cause, whether specifically excepted by any of the provisions hereof or not, until the expiration of one year from the date of his election or employment.

SEC. 9. Every president, director, officer or manager of any firm, association or corporation engaged in commerce as a common carrier, who embezzles, steals, abstracts or willfully misapplies, or willfully permits to be misapplied, any of the moneys, funds, credits, securities, property or assets of such firm, association or corporation, arising or accruing from, or used in, such commerce, in whole or in part, or willfully or knowingly converts the same to his own use or to the use of another, shall be deemed guilty of a felony and upon conviction shall be fined not less than \$500 or confined in the penitentiary not less than one year nor more than ten years, or both, in the discretion of the court.

Prosecutions hereunder may be in the district court of the United States for the district wherein the offense may have been committed.

That nothing in this section shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof; and a judgment of conviction or acquittal on the merits under the laws of any State shall be a bar to any prosecution hereunder for the same act or acts.

SEC. 10. That after two years from the approval of this Act no common carrier engaged in commerce shall have any dealings in securities, supplies or other articles of commerce, or shall make or have any contracts for construction or maintenance of any kind, to the amount of more than \$50,000, in the aggregate, in any one year, with another corporation, firm, partnership or association when the said common carrier shall have upon its board of directors or as its president, manager or as its purchasing or selling officer, or agent in the particular transaction, any person who is at the same time a director, manager, or

purchasing or selling officer of, or who has any substantial interest in, such other corporation, firm, partnership or association, unless and except such purchases shall be made from, or such dealings shall be with, the bidder whose bid is the most favorable to such common carrier, to be ascertained by competitive bidding under regulations to be prescribed by rule or otherwise by the Interstate Commerce Commission. No bid shall be received unless the name and address of the bidder or the names and addresses of the officers, directors and general managers thereof, if the bidder be a corporation, or of the members, if it be a partnership or firm, be given with the bid.

Any person who shall, directly or indirectly, do or attempt to do anything to prevent anyone from bidding or shall do any act to prevent free and fair competition among the bidders or those desiring to bid shall be punished as prescribed in this section in the case of an officer or director.

Every such common carrier having any such transactions or making any such purchases shall within thirty days after making the same file with the Interstate Commerce Commission a full and detailed statement of the transaction showing the manner of the competitive bidding, who were the bidders, and the names and addresses of the directors and officers of the corporations and the members of the firm or partnership bidding; and whenever the said commission shall, after investigation or hearing, have reason to believe that the law has been violated in and about the said purchases or transactions it shall transmit all papers and documents and its own views or findings regarding the transaction to the Attorney General.

If any common carrier shall violate this section it shall be fined not exceeding \$25,000; and every such director, agent, manager or officer thereof who shall have knowingly voted for or directed the act constituting such violation or who shall have aided or abetted in such violation shall be deemed guilty of a misdemeanor and shall be fined not exceeding \$5,000, or confined in jail not exceeding one year, or both, in the discretion of the court.

SEC. 11. That authority to enforce compliance with sections two, three, seven and eight of this Act by the persons respectively subject thereto is hereby vested: in

the Interstate Commerce Commission where applicable to common carriers, in the Federal Reserve Board where applicable to banks, banking associations and trust companies, and in the Federal Trade Commission where applicable to all other character of commerce, to be exercised as follows:

Whenever the commission or board vested with jurisdiction thereof shall have reason to believe that any person is violating or has violated any of the provisions of sections two, three, seven and eight of this Act, it shall issue and serve upon such person a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the commission or board requiring such person to cease and desist from the violation of the law so charged in said complaint. Any person may make application, and upon good cause shown may be allowed, by the commission or board, to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the commission or board. If upon such hearing the commission or board, as the case may be, shall be of the opinion that any of the provisions of said sections have been or are being violated, it shall make a report in writing in which it shall state its findings as to the facts, and shall issue and cause to be served on such person an order requiring such person to cease and desist from such violations, and divest itself of the stock held or rid itself of the directors chosen contrary to the provisions of sections seven and eight of this Act, if any there be, in the manner and within the time fixed by said order. Until a transcript of the record in such hearing shall have been filed in a circuit court of appeals of the United States, as hereinafter provided, the commission or board may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section.

If such person fails or neglects to obey such order of the commission or board while the same is in effect, the com-

mission or board may apply to the circuit court of appeals of the United States, within any circuit where the violation complained of was or is being committed or where such person resides or carries on business, for the enforcement of its order, and shall certify and file with its application a transcript of the entire record in the proceeding, including all the testimony taken and the report and order of the commission or board. Upon such filing of the application and transcript the court shall cause notice thereof to be served upon such person and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the commission or board. The findings of the commission or board as to the facts, if supported by testimony, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the commission or board, the court may order such additional evidence to be taken before the commission or board and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The commission or board may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by testimony, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari as provided in section two hundred and forty of the Judicial Code.

Any party required by such order of the commission or board to cease and desist from a violation charged may obtain a review of such order in said circuit court of appeals by filing in the court a written petition praying that the order of the commission or board be set aside. A copy of

such petition shall be forthwith served upon the commission or board, and thereupon the commission or board forthwith shall certify and file in the court a transcript of the record as hereinbefore provided. Upon the filing of the transcript the court shall have the same jurisdiction to affirm, set aside, or modify the order of the commission or board as in the case of an application by the commission or board for the enforcement of its order, and the findings of the commission or board as to the facts, if supported by testimony, shall in like manner be conclusive.

The jurisdiction of the circuit court of appeals of the United States to enforce, set aside, or modify orders of the commission or board shall be exclusive.

Such proceedings in the circuit court of appeals shall be given precedence over other cases pending therein, and shall be in every way expedited. No order of the commission or board or the judgment of the court to enforce the same shall in any wise relieve or absolve any person from any liability under the antitrust Acts.

Complaints, orders, and other processes of the commission or board under this section may be served by anyone duly authorized by the commission or board, either (a) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or to the president, secretary, or other executive officer or a director of the corporation to be served; or (b) by leaving a copy thereof at the principal office or place of business of such person; or (c) by registering and mailing a copy thereof addressed to such person at his principal office or place of business. The verified return by the person so serving said complaint, order, or other process setting forth the manner of said service shall be proof of the same, and the return post-office receipt for said complaint, order, or other process registered and mailed as aforesaid shall be proof of the service of the same.

SEC. 12. That any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.

SEC. 13. That in any suit, action, or proceeding brought by or on behalf of the United States subpoenas for witnesses who are required to attend a court of the United States in any judicial district in any case, civil or criminal, arising under the antitrust laws may run into any other district: *Provided*, That in civil cases no writ of subpoena shall issue for witnesses living out of the district in which the court is held at a greater distance than one hundred miles from the place of holding the same without the permission of the trial court being first had upon proper application and cause shown.

SEC. 14. That whenever a corporation shall violate any of the penal provisions of the antitrust laws, such violation shall be deemed to be also that of the individual directors, officers, or agents of such corporation who shall have authorized, ordered, or done any of the acts constituting in whole or in part such violation, and such violation shall be deemed a misdemeanor, and upon conviction therefor of any such director, officer, or agent he shall be punished by a fine of not exceeding \$5,000 or by imprisonment for not exceeding one year, or by both, in the discretion of the court.

SEC. 15. That the several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this Act, and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition, the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition, and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises. Whenever it shall appear to the court before which any such proceeding may be pending that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not,

and subpoenas to that end may be served in any district by the marshal thereof.

SEC. 16. That any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections two, three, seven and eight of this Act, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided*, That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission.

SEC. 17. That no preliminary injunction shall be issued without notice to the opposite party.

No temporary restraining order shall be granted without notice to the opposite party unless it shall clearly appear from specific facts shown by affidavit or by the verified bill that immediate and irreparable injury, loss, or damage will result to the applicant before notice can be served and a hearing had thereon. Every such temporary restraining order shall be indorsed with the date and hour of issuance, shall be forthwith filed in the clerk's office and entered of record, shall define the injury and state why it is irreparable and why the order was granted without notice, and shall by its terms expire within such time after entry, not to exceed ten days, as the court or judge may fix, unless within the time so fixed the order is extended for a like period for good cause shown, and the reasons for such extension shall be entered of record. In case a temporary restraining order shall be granted without notice in the

contingency specified, the matter of the issuance of a preliminary injunction shall be set down for a hearing at the earliest possible time and shall take precedence of all matters except older matters of the same character; and when the same comes up for hearing the party obtaining the temporary restraining order shall proceed with the application for a preliminary injunction, and if he does not do so the court shall dissolve the temporary restraining order. Upon two days' notice to the party obtaining such temporary restraining order the opposite party may appear and move the dissolution or modification of the order, and in that event the court or judge shall proceed to hear and determine the motion as expeditiously as the ends of justice may require.

Section two hundred and sixty-three of an Act entitled "An Act to codify, revise, and amend the laws relating to the judiciary," approved March third, nineteen hundred and eleven, is hereby repealed.

Nothing in this section contained shall be deemed to alter, repeal, or amend section two hundred and sixty-six of an Act entitled "An Act to codify, revise, and amend the laws relating to the judiciary", approved March third, nineteen hundred and eleven.

SEC. 18. That, except as otherwise provided in section 16 of this Act, no restraining order or interlocutory order of injunction shall issue, except upon the giving of security by the applicant in such sum as the court or judge may deem proper, conditioned upon the payment of such costs and damages as may be incurred or suffered by any party who may be found to have been wrongfully enjoined or restrained thereby.

SEC. 19. That every order of injunction or restraining order shall set forth the reasons for the issuance of the same, shall be specific in terms, and shall describe in reasonable detail, and not by reference to the bill of complaint or other document, the act or acts sought to be restrained, and shall be binding only upon the parties to the suit, their officers, agents, servants, employees, and attorneys, or those in active concert or participating with them, and who shall, by personal service or otherwise, have received actual notice of the same.

SEC. 20. That no restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.

SEC. 21. That any person who shall willfully disobey any lawful writ, process, order, rule, decree, or command of any district court of the United States or any court of the District of Columbia by doing any act or thing therein, or thereby forbidden to be done by him, if the act or thing so done by him be of such character as to constitute also a criminal offense under any statute of the United States, or

under the laws of any State in which the act was committed, shall be proceeded against for his said contempt as hereinafter provided.

SEC. 22. That whenever it shall be made to appear to any district court or judge thereof, or to any judge therein sitting, by the return of a proper officer on lawful process, or upon the affidavit of some credible person, or by information filed by any district attorney, that there is reasonable ground to believe that any person has been guilty of such contempt, the court or judge thereof, or any judge therein sitting, may issue a rule requiring the said person so charged to show cause upon a day certain why he should not be punished therefor, which rule, together with a copy of the affidavit or information, shall be served upon the person charged, with sufficient promptness to enable him to prepare for and make return to the order at the time fixed therein. If upon or by such return, in the judgment of the court, the alleged contempt be not sufficiently purged, a trial shall be directed at a time and place fixed by the court: *Provided, however,* That if the accused, being a natural person, fail or refuse to make return to the rule to show cause, an attachment may issue against his person to compel an answer, and in case of his continued failure or refusal, or if for any reason it be impracticable to dispose of the matter on the return day, he may be required to give reasonable bail for his attendance at the trial and his submission to the final judgment of the court. Where the accused is a body corporate, an attachment for the sequestration of its property may be issued upon like refusal or failure to answer.

In all cases within the purview of this Act such trial may be by the court, or, upon demand of the accused, by a jury; in which latter event the court may impanel a jury from the jurors then in attendance, or the court or the judge thereof in chambers may cause a sufficient number of jurors to be selected and summoned, as provided by law, to attend at the time and place of trial, at which time a jury shall be selected and impaneled as upon a trial for misdemeanor; and such trial shall conform, as near as may be, to the practice in criminal cases prosecuted by indictment or upon information.

If the accused be found guilty, judgment shall be entered accordingly, prescribing the punishment, either by fine or imprisonment, or both, in the discretion of the court. Such fine shall be paid to the United States or to the complainant or other party injured by the act constituting the contempt, or may, where more than one is so damaged, be divided or apportioned among them as the court may direct, but in no case shall the fine to be paid to the United States exceed, in case the accused is a natural person, the sum of \$1,000, nor shall such imprisonment exceed the term of six months: *Provided*, That in any case the court or a judge thereof may, for good cause shown, by affidavit or proof taken in open court or before such judge and filed with the papers in the case, dispense with the rule to show cause, and may issue an attachment for the arrest of the person charged with contempt; in which event such person, when arrested, shall be brought before such court or a judge thereof without unnecessary delay and shall be admitted to bail in a reasonable penalty for his appearance to answer to the charge or for trial for the contempt; and thereafter the proceedings shall be the same as provided herein in case the rule had issued in the first instance.

SEC. 23. That the evidence taken upon the trial of any persons so accused may be preserved by bill of exceptions, and any judgment of conviction may be reviewed upon writ of error in all respects as now provided by law in criminal cases, and may be affirmed, reversed, or modified as justice may require. Upon the granting of such writ of error, execution of judgment shall be stayed, and the accused, if thereby sentenced to imprisonment, shall be admitted to bail in such reasonable sum as may be required by the court, or by any justice, or any judge of any district court of the United States or any court of the District of Columbia.

SEC. 24. That nothing herein contained shall be construed to relate to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or

prosecuted in the name of, or on behalf of, the United States, but the same, and all other cases of contempt not specifically embraced within section twenty-one of this Act, may be punished in conformity to the usages at law and in equity now prevailing.

SEC. 25. That no proceeding for contempt shall be instituted against any person unless begun within one year from the date of the act complained of; nor shall any such proceeding be a bar to any criminal prosecution for the same act or acts; but nothing herein contained shall affect any proceedings in contempt pending at the time of the passage of this Act.

SEC. 26. If any clause, sentence, paragraph, or part of this Act shall, for any reason, be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, or part thereof directly involved in the controversy in which such judgment shall have been rendered.¹

§ 1339. Judicial Interpretations of the Clayton Act.

Before the Sherman Act it was the law that a trader might reject the offer of a proposing buyer, for any reason that appealed to him; it might be because he did not like the other's business methods, or because he had some personal difference with him, political, racial, or social. That was purely his own affair, with which nobody had any concern. Neither the Sherman Act, nor any decision of the Supreme Court construing it, nor the Clayton Act, has changed the law in this particular. We have not yet reached the stage where the selection of a trader's customers is made for him by the Government.¹ The refusal of a manufacturer of an unpatented article to sell it to a dealer who resells at less than regular prices, or who uses it in a manner which lessens the trade of the maker, is not a violation of the Clayton Act.²

§ 1338. ¹ Approved October 15, 1914.

See also *Coca-Cola Co. v. Butler & Sons*, 229 Fed. 224, 233.

§ 1339. ¹ *Great Atlantic & Pacific Tea Co. v. Cream of Wheat Co.*, 227 Fed. 46, 49, 141 C. C. A. 594 (2d Cir.), *affirming* 224 Fed. 860.

² *Great Atlantic & Pacific Tea Co. v. Cream of Wheat Co.*, 224 Fed. 571.

In the Clayton Act nothing is said of combinations or conspiracies, or monopolizing or attempting to monopolize any part of the commerce among the several States, as was required in a prosecution under the Sherman Act. Evidently Congress was not satisfied to only prohibit actual lessening of competition, or monopolizing, but intended to make it unlawful for any person to do those acts which may put it in his power to do so. For these reasons, all that is necessary to state a cause of action under the Clayton Act is to charge that the defendants committed the acts prohibited by the statute and that they tend to substantially lessen competition or create a monopoly in interstate commerce.³ Where a contract involves and restrains interstate commerce, the prohibitions of the act apply although the particular act of infringement occurred in the State where the contract was made.⁴ The sale by a manufacturer and its agent of automobile tires and accessories to manufacturers of automobiles at a less price than it sold to dealers is not a violation of Section 2 of the Clayton Act, there being no allegation that the defendant and its agent had a monopoly "in any line of commerce." Manufacturers of automobiles ordinarily would buy tires in much larger quantities than dealers, and consequently the defendants could generally afford to sell to such manufacturers at a lower price than to dealers. The manufacturers sell to dealers, and the latter to the consumer. There is apparently no competition between the manufacturers of tires and the dealers. The differentiation in price would not therefore substantially lessen competition. If such would be the effect, it must be set forth in some discernible way, and not in the mere language of the statute.⁵ Under Section 3, a manufacturer, who by virtue of patents had a monopoly for the manufacture of motion picture machines, cannot, in selling or leasing such machines, require the purchaser to use only films manufactured by it after its patent on films has expired.⁶ Section 3 of the Clayton Act, as applied to

³ *United States v. United Shoe Machinery Co.*, 234 Fed. 127, 150; *Standard Fashion Co. v. Magrane Houston Co.*, 254 Fed. 493, 498.

⁴ *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 235 Fed. 398, 148 C. C. A. 660 (2d Cir.).

⁵ *Baran v. Goodyear Tire & Rubber Co.*, 256 Fed. 570, 574.

⁶ *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, *supra*.

leases, is not unconstitutional.⁷ The Act is applicable to a continuing contract of lease or other continuing contract, although made before its passage.⁸ The Clayton Act applies only to leases, sales, or contracts for sale, and does not apply to agency contracts.⁹ A contract for the sale of patterns to a retail store for a term of years, during which the buyer agrees to keep on hand a certain quantity at all times, and "not to sell or permit to be sold on its premises during the term of the contract any other make of patterns and not to sell Standard patterns, except at label prices", is held illegal and void as in violation of Section 3.¹⁰ A contract between the publisher of a periodical and its so-called "district agents", which prohibited the handling by the latter of other magazines without the consent of said publisher, and which consent was withheld in the case of a magazine published by the plaintiff, was held not forbidden as requiring purchasers to refrain from handling the goods of competitors, or as generally causing unreasonable restraint of trade; district agents being more than mere "purchasers."¹¹ Organizations excepted from the anti-trust laws by Section 6 are not privileged to adopt methods of carrying on their business which would not be permitted to other lawful associations; therefore a secondary boycott, by such an association, seeking to prevent others from trading with one blacklisted by it, is unlawful.¹² The Clayton Act, Section 20, legalizes regular and proper strikes by trade unions, and takes combinations or agreements to bring about that class of strikes out of the purview of Section 1 of the Sherman Act, but it does not apply to irregular or malicious strikes, those not entered into for the betterment of labor conditions. Where a strike has nothing to do with a dispute over wages, and where the orders which were issued to the workmen were dishonest and corrupt, and they were given no reason for their ceasing work, the Clayton Act has no application.¹³ The Clayton Act does not authorize

⁷ *United States v. United Shoe Machinery Co.*, *supra*.

⁸ *Ibid.*; *Elliott Machine Co. v. Center*, 227 Fed. 126; *Motion Picture Patent Co. v. Universal Film Co.*, *supra*.

⁹ *Standard Fashion Co. v. Magrane Houston Co.*, 254 Fed. 493.

¹⁰ *Ibid.*

¹¹ *Pictorial Review Co. v. Curtis Pub. Co.*, 255 Fed. 206.

¹² *United States v. King*, 250 Fed. 908.

¹³ *United States v. Norris*, 255 Fed. 423.

molestation of employees by strikers.¹⁴ Nor does it apply to an unlawful act like a secondary boycott.¹⁵ Nor does Section 6 of the Clayton Act ¹⁶ exempt an association of shippers of agricultural products from prosecution. This section is intended to apply to an agricultural association and not mere shippers.¹⁷ A New Jersey corporation owning a controlling interest in the stock of an Ohio manufacturing corporation, which sold the product of the Ohio company, which was in fact its subsidiary, does not thereby come within Section 7.¹⁸

§ 1340. The Federal Trade Commission Act as Affecting the Sherman and Clayton Acts. — Penalties.

By Section 5 of Act of April 10, 1918.

“An Act to promote export trade and for other purposes,” it is provided that every association engaged solely in export trade shall within sixty days of the passage of the act or thirty days after the creation of the association, file with the Federal Trade Commission a verified written statement setting forth the location of its offices or places of business and the names and addresses of all its officers and of all its stockholders or members, and, if a corporation, a copy of its certificate or articles of incorporation and by-laws, and if unincorporated, a copy of its articles or contract of association, and on each January thereafter shall file a like statement, with any amendments and changes. It shall also furnish to the commission such information as the commission may require as to its organization, business, conduct, practices, management, and relation to other associations, corporations, partnerships, and individuals. Any association failing to do so shall not have the benefit of sections 1 and 2 of the act, and shall also forfeit to the United States the sum of \$100 for each day of continuance of such failure, to be recoverable in a civil suit brought by the district attorney under direction of the Attorney General of the United States in the district where the asso-

¹⁴ *United States v. Norris, supra*;
Kroger Grocery, etc. Co. v. Retail,
etc. Co., 250 Fed. 890.

¹⁵ *United States v. Norris, supra*;
United States v. King, supra.

¹⁶ Act Oct. 15, 1914, Chap. 323, § 6.

¹⁷ *United States v. King, supra*.

¹⁸ *Niles-Bement-Pond Co. v. Iron*
Molders' Union, Local No. 68, 246
Fed. 851.

ciation has its principal place of business, or where it does business. Whenever the Commission shall have reason to believe that an association or any agreement made or act done by an association is in restraint of trade within the United States or in restraint of the export trade of any domestic competitor of such association, or that an association either in the United States or elsewhere has entered into any agreement, understanding or conspiracy, or done any act which artificially or intentionally enhances or depresses prices within the United States of commodities of the class exported by such association, or which substantially lessens competition within the United States or otherwise restrains trade therein, it shall summon such association, its officers and agents, to appear before it, and thereafter conduct an investigation into the alleged violations of law. If it concludes that the law has been violated it may make to the association recommendations for the readjustment of its business in accordance with law. If the association fails to comply with such recommendations, the Commission shall refer its findings and recommendations to the Attorney General of the United States for such action thereon as he may deem proper.

§ 1341. Notes on Federal Trade Commission Act.

“Commerce” and “Corporation” as used in the act are defined in Section 4. The words “unfair methods of competition in trade” declared unlawful by Section 5 seem purposely to have been left undefined. Banks and common carriers are, by Section 5, excepted from the jurisdiction of the Federal Trade Commission. The criminal provisions of the Federal Trade Commission Act are in Section 10. By this section willful failure to testify is made a criminal act, punishable as a penal offense. Paragraph 2 of that section makes it punishable by fine and imprisonment, to be enforced by criminal prosecution in any Federal Court of competent jurisdiction, to make false entries in corporate reports or other corporate records. Failure to file annual or special reports required by the act is punishable by fine of \$100 for each day the failure continues. This is not enforceable by criminal prosecution, however, but by civil action. Unauthorized publication of filed reports, etc. is a misdemeanor, punishable by fine of

\$5000, or one year's imprisonment. The act has an immunity clause, end of Section 9, to which the general rules and decisions as to immunity provisions of course apply. It has recently been held that the Federal Trade Commission is without power to regulate the relation of employer and employee.¹

§ 1342. Purpose and Scope of Act.

The commissioners are not required to aver and prove that any competitor has been damaged or that any purchaser has been deceived. The commissioners, representing the government as *parens patriæ*, are to exercise their common sense, as informed by their knowledge of the general idea of unfair trade at common law, and stop all those trade practices that have a tendency to injure competitors directly or through deception of purchasers, quite irrespective of whether the specific practices in question have yet been denounced in common law cases. But the restraining order of the commissioners is merely provisional. The trader is entitled to his day in court, and there the same principles and tests that have been applied under the common law or under statutes of the kinds condemning "unreasonable rate", "unjust discrimination", etc. are expected by Congress to control. Therefore the section is not void for indefiniteness because the words "unfair methods of competition" are not defined.¹ There is no intent in the statute on the part of Congress, even if it has the power, to restrain the owner of property from selling it at any price that is acceptable to him or from giving it away. But the commission may prevent the sale of staple articles below cost when accompanied by representations which would injure other traders.² Unfair methods of competition between individuals are not contemplated by the act. Congress could not have intended to submit to the determination of the commission such questions as whether a person, partnership, or corporation had treated or bribed the employees of a competitor for the purpose of inducing them to betray their employer. The unfair methods,

§ 1341. ¹ *Asbestos Co. v. Federal Trade Commission*, 264 Fed. 509 — Fed. 307, 166 C. C. A. 196 (7th Cir.).
C. C. A. — (2d Cir.).

² *Ibid.*

§ 1342. ¹ *Sears, Roebuck & Co.*

though not restricted to such as violate the Anti-Trust Acts, must be at least such as are unfair to the public generally.³

§ 1343. Safety Appliance Acts — Penalties — Civil, not Criminal Actions.

An action by the United States to recover from a railroad the penalty prescribed for violations of the Safety Appliance Acts is a civil, not a criminal, action.¹ And the rules of law governing the construction of criminal statutes are not applicable.²

§ 1344. Hours of Service Act — Actions for Penalties Civil, not Criminal.

Actions for violation of the Hours of Service Act are civil, and the rules governing civil procedure apply thereto.¹

§ 1345. 28-Hour Live Stock Law — Penalties Recoverable by Civil Action.

By Section 4 penalties under the act are recoverable by civil action.

ELKINS ACT

§ 1346. Constitutionality of Elkins Act.

The Elkins Act was held constitutional and applicable to corporations as well as to individuals¹ and makes the corporation criminally responsible for acts violative of the Interstate Commerce Act done by its agent.² The act is not unconstitutional as depriving shippers or carriers of property rights without due

³ Federal Trade Commission v. Gratz, 258 Fed. 314, 166 C. C. A. 668 (2d Cir.).

§ 1343. ¹ Chicago etc. R. Co. v. United States, 220 U. S. 559, 55 L. ed. 582, 31 S. C. 612, *affirming* 170 Fed. 556, 95 C. C. A. 642 (8th Cir.); United States v. Louisville & N. R. Co., 162 Fed. 185, *affirmed* 175 Fed. 1021, 99 C. C. A. 665 (5th Cir.); United States v. Chicago etc. R. Co., 162 Fed. 775; United States v. St. Louis Southwestern R. Co., 184 Fed. 28, 106 C. C. A. 230 (5th Cir.).

² Johnston v. Southern Pacific, 196 U. S. 1, 49 L. ed. 363, 25 S. C. 158; United States v. Great Northern R.

Co., 229 Fed. 927, 144 C. C. A. 206 (9th Cir.); *contra* United States v. Illinois Cent. R. Co., 156 Fed. 182.

§ 1344. ¹ Delano v. United States, 220 Fed. 635, 136 C. C. A. 110 (7th Cir.); United States v. Kansas City Southern R. Co., 202 Fed. 828, 121 C. C. A. 136 (8th Cir.).

§ 1346. ¹ New York Central & Hudson River R. R. Co. v. United States, 212 U. S. 481, 494, 53 L. ed. 613, 29 S. C. 304.

² United States v. Adams Express Co., 229 U. S. 381, 57 L. ed. 1237, 33 S. C. 878; New York Central and Hudson River R. R. Co. v. United States, *supra*.

process of law,³ nor because it subjects a shipper to prosecution for accepting a concession from a filed rate without permitting him to show that the established rate was extortionate and unreasonable.⁴ By the Hepburn Amendment transportation of interstate commerce by a railroad which has not filed its rates for such service is a misdemeanor.⁵

§ 1347. Who May Be Liable.

Under the Elkins Act, transportation, with a rebate, or at a concession from the established rates, is made an offense as to the shipper as well as the carrier, thereby differentiating the Elkins Act from § 10 of the Act of 1889.¹ Forwarders of freight in their own name are shippers, and the payment to them by the carrier of a salary or commission for shipping the freight is a rebate or concession under the statute.² A consignee is chargeable with a violation of Section 1 by receiving rebates or concessions as well as a consignor.³

§ 1348. Carriers by Water.

Broadly speaking, the act does not apply to carriers by water. As a general rule, such carriers are not required to file or publish their rates, and are under no statutory restrictions with respect to rebates or other discriminations. Such carriers are subject to the act only, as provided in Section 1, when they are "under a common control, management or arrangement" with railroad carriers as to continuous interstate shipments.¹ A private car company furnishing its cars to railroads for the indiscriminate use of shippers, and receiving payment therefor from the railroad companies on a mileage basis is within the statute.²

§ 1349. What Constitutes Offense.

The statute aims to prohibit not only discrimination as between shippers, but departure from the tariff rates, irrespective of its

³ *United States v. Great Northern R. Co.*, 157 Fed. 288.

⁴ *United States v. Vacuum Oil Co.*, 158 Fed. 536.

⁵ *United States v. Illinois Terminal R. Co.*, 168 Fed. 546.

§ 1347. ¹ *Armour Packing Co. v. United States*, 209 U. S. 56, 75, 52 L. ed. 681, 28 S. C. 428.

² *United States v. Lehigh Valley R. Co.*, 222 Fed. 685.

³ *United States v. Standard Oil Co.*, 148 Fed. 719.

§ 1348. ¹ *Mutual Transit Co. v. United States*, 178 Fed. 664, 102 C. C. A. 164 (2d Cir.).

² *Interstate Commerce Commission v. Reichmann*, 145 Fed. 235.

actual discriminatory effect. The history of this legislation demonstrates that both discriminations and rebates have ever been sought to be hidden under the most subtle disguises. Every device that seeks to cover up either a rebate or a discrimination in interstate transportation is denounced by the statute, provided only, as to a rebate, that thereby the property is actually transported at less than the tariff rate. That the full tariff rate is collected at the time of transportation does not negative the possibility of a rebate in respect thereto. The rebate may be in a lump cash sum in advance, or by later or earlier indirect payments.¹ Section 1, in so far as it applies to the shipper, creates three distinct offenses: First, the soliciting of a rebate, concession or discrimination in respect of the transportation of property in interstate or foreign commerce; second, the acceptance of any such rebate, concession or discrimination; third, the receipt of such rebate, concession or discrimination.²

HEPBURN ACT

§ 1350. Hepburn Act — Effect of Guilty Knowledge.

In so far as Section 1 of the Elkins Act provided for the punishment of acts of corporate carriers in knowingly offering, granting, or giving, and the acts of corporate shippers in knowingly soliciting, accepting, or receiving rebates, concessions, or discriminations from the legal rates and tariffs, it was not abrogated or repealed by the Hepburn Act, but was preserved and continued; and in so far as it provided for the punishment of such acts, when not knowingly done — assuming, but not deciding, that it did so provide — it was repealed.¹ While carrying at a less or different rate than the tariff rate is not in terms declared an offense, or penalized, it is punishable as a failure strictly to observe such tariff.² The extension of several months' credit to one shipper, while requiring monthly payments from others, is an extension of an advantage to such shipper involving a correlative discrimination

§ 1349. ¹ *Vandalia R. R. Co. v. United States*, 226 Fed. 713, 141 C. C. A. 469 (7th Cir.).

² *United States v. Bunch*, 165 Fed. 736.

§ 1350. ¹ *Great Northern Ry. Co. v. United States*, 155 Fed. 945, 84 C. C. A. 93 (8th Cir.).

² *Hocking Valley Ry. Co. v. United States*, 210 Fed. 735, 127 C. C. A. 285 (6th Cir.).

in respect to those not so favored.³ If the court can say, as matter of law, that the distinction made is or might be material and substantial, giving to the favored one a real advantage, which others did not get, then it becomes the forbidden discrimination; if the facts do not justify this declaration, but the acts can, at most, have only negligible results, or are on debatable ground, then prosecution may be barred.⁴ The statute contains no provision excepting special contracts from its operation. One rate is to be charged and that the one fixed and published in the manner pointed out in the statute, and subject to change in the only way open by the statute. There is no provision for the filing of contracts with shippers and no method of making them public defined in the statute.⁵ To guarantee a particular connection and transportation by a particular train amounts to giving a preference when not open to all and provided for in the published tariffs, and under the Elkins Act is an illegal discrimination.⁶ Section 1 applies to a filed schedule of rates on interstate shipments to points beyond the railroad's own line as well as to those between points on its own line.⁷ The objects of the Elkins Act are to prevent favoritism, and to secure equal rights to all in interstate transportation, and one legal rate, to be published and posted and accessible to all alike.⁸ The act is not restricted to alleged departures from an established tariff rate, but is violated if any other advantage is given to a shipper whereby a discrimination is practiced.⁹ Any departure by an interstate railroad from its filed and published demurrage charges constitutes a misdemeanor under Section 1.¹⁰

³ Hocking Valley Ry. Co. v. United States, 210 Fed. 735, 127 C. C. A. 285 (6th Cir.).

⁴ *Ibid.*

⁵ Armour Packing Co. v. United States, 209 U. S. 56, 81, 52 L. ed. 681, 28 S. C. 428.

⁶ Chicago & Alton R. R. Co. v. Kirby, 225 U. S. 155, 56 L. ed. 1033, 32 S. C. 648.

⁷ United States v. Standard Oil Co., 148 Fed. 719.

⁸ New York Central & Hudson River R. R. Co. v. United States,

212 U. S. 481, 495, 53 L. ed. 613, 29 S. C. 304; Armour Packing Co. v. United States, *supra*; United States v. Union Stock Yard and Transit Co., 226 U. S. 286, 309, 57 L. ed. 226, 33 S. C. 83.

⁹ United States v. Vacuum Oil Co., 158 Fed. 536.

¹⁰ Lehigh Valley R. Co. v. United States, 188 Fed. 879, 110 C. C. A. 513 (3d Cir.); United States v. Philadelphia & Reading Ry. Co., 184 Fed. 543.

§ 1351. Foreign Commerce.

There is no attempt in the language of the act to exempt such foreign commerce as is carried on through a bill of lading; on the contrary, the act in terms applies to the transportation of property shipped from any place in the United States to a foreign country and carried from such place to a port of transshipment.¹

§ 1352. Indictment — Sufficiency.

An indictment under the act is sufficient if it specifically states the elements of the offense with sufficient particularity to fully advise the defendant of the crime charged and to enable a conviction, if had, to be pleaded in bar of any subsequent prosecution for the same offense, as provided in Section 1025 of the Revised Statutes.¹ No device or contrivance, secret or fraudulent in its nature, is requisite to the commission of the offense outlined in the statute, and any means by which transportation by a concession from the established rate was had is sufficient to work a conviction;² therefore the details of the device by which rebates were received need not be set out in the indictment.³ The term "device" as used in the statute includes any plan or contrivance whereby merchandise is transported for less than the published rate, or any other advantage is given to, or discrimination practiced in favor of, the shipper.⁴ An indictment for violation of Section 1 need not allege that the carrier's published rate was a reasonable one, nor set out its tariffs in full. An averment that a certain named rate was in force between designated points as shown by the published tariffs is sufficient.⁵ An indictment for receiving rebates alleging transportation at a lower rate than the lowest total rate as shown by the published tariffs was held bad

§ 1351. ¹ *Armour Packing Co. v. United States*, 209 U. S. 56, 78, 52 L. ed. 681, 28 S. C. 428.

§ 1352. ¹ *New York Central & Hudson River R. R. Co. v. United States*, 212 U. S. 481, 497, 53 L. ed. 613, 29 S. C. 304; *Armour Packing Co. v. United States*, 209 U. S. 56, 52 L. ed. 681, 28 S. C. 428.

² *Armour Packing Co. v. United States*, *supra*.

³ *Armour Packing Co. v. United States*, *supra*; *Chicago, St. P. M. & O. Ry. Co. v. United States*, 162 Fed. 835, 90 C. C. A. 211 (8th Cir.); *Grand Rapids & I. Ry. Co. v. United States*, 212 Fed. 577, 129 C. C. A. 113 (6th Cir.).

⁴ *Armour Packing Co. v. United States*, *supra*.

⁵ *United States v. Standard Oil Co.*, 148 Fed. 719.

in that it did not negative the existence of a joint through rate lower than the total of the local rates.⁶ An indictment is sufficient which charges the payment of a refund which is a rebate on freights, and where it appears that the payment was made to the shipper by a corporation which held a majority of the stock of the two carriers concerned, when coupled with the allegation that the payment was *knowingly* made by the carriers as a rebate; this being a sufficient allegation of rebating by a *device*.⁷ It is not necessary to allege the name of, or describe, the agent or agents who granted the rebate. An agent or officer of the carrier may be jointly indicted with the principal.⁸ There is no misjoinder in including both the agent and the corporation in one indictment. The purpose of the act was to make the act of the agent the act of the corporation, and to include both within the prohibitions and restrictions of the statute.⁹

§ 1353. Indictments Insufficient for Uncertainty and Want of Particularity.

The indictment must be construed *fortius contra proferentem*. The language must necessarily import the offense charged, and, if susceptible of a different interpretation, it is bad. Every fact necessary to constitute the crime must be directly and positively alleged, and nothing can be charged by implication or intendment.¹

§ 1354. Duplicity.

The substantive offense is the payment and receipt of the rebate, and an indictment is not bad for duplicity because it also avers the offer or agreement pursuant to which the payment was made.¹ An indictment alleging that the defendant carrier offered, granted and gave a rebate is not duplicitous, but charges only one offense.²

⁶ United States v. Standard Oil Co., 148 Fed. 719.

⁷ United States v. Cleveland, C. C. & St. L. Ry. Co., 234 Fed. 178, 186.

⁸ United States v. Erie R. Co., 222 Fed. 444, 447; United States v. New York Central & H. R. R. Co., 146 Fed. 298.

⁹ New York Central & Hudson River R. R. Co. v. United States, *supra*.

§ 1353. ¹ United States v. Philadelphia & Reading Ry. Co., 232 Fed. 953 (uncertainty as to facts of delay where demurrage concessions charged); *ibid.* 946 (filing of tariffs and particulars of special privileges granted not shown).

§ 1354. ¹ United States v. Great Northern R. Co., 157 Fed. 288.

² United States v. Delaware, L. & W. R. Co., 152 Fed. 269.

§ 1355. When Only One Offense.

To warrant the conviction of a shipper for receiving rebates in violation of Section 1, the fact of the payment thereof by or on behalf of the carrier, and its receipt by or on behalf of the shipper, must be proved. Each payment constitutes but one offense although it may cover more than one shipment.¹ The offense is not a continuous offense, although all the payments were made under one agreement, rebates on different shipments being given at short intervals. The offense was complete when each stipulated rebate was paid.²

§ 1356. Intent.

The intent of the carrier is of the essence of the offense, and a departure from the established and published interstate freight rate, in order to constitute a crime under the Elkins Act, must be willful.¹ Evidence to show absence of intent to grant a concession from the established freight rate is admissible.² It is held that the use of the word "willful" does not require the existence of evil intent, as applied to the granting of rebates from the published schedule rates; but it is sufficient if the act was done knowingly and purposely.³

§ 1357. Knowledge.

A carrier which willfully and intentionally remains in ignorance of the facts necessary to determine whether the rate was lawful, is charged with the knowledge of the facts which reasonable inquiry and investigation would have revealed.¹

§ 1355. ¹ *United States v. Bunch*, 165 Fed. 736.

² *New York Central & Hudson River R. R. Co. v. United States*, 212 U. S. 481, 498, 53 L. ed. 613, 29 S. C. 304.

§ 1356. ¹ *Atchison T. & S. F. Ry. Co. v. United States*, 170 Fed. 250, 95 C. C. A. 446 (9th Cir.).

² *Ibid.*

³ *Chicago, St. P. M. & O. Ry. Co. v. United States*, 162 Fed. 835, 90 C. C. A. 211 (8th Cir.).

§ 1357. ¹ *United States v. Erie Co.*, 222 Fed. 444, 448.

CHAPTER LXXXVI

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§ 1358. National Prohibition — Act Oct. 28, 1919.

§ 1359. § 1. Short Title of Act.

The short title of this Act shall be the "National Prohibition Act."¹

TITLE I**TO PROVIDE FOR THE ENFORCEMENT OF WAR PROHIBITION****§ 1360. Title I, § 1. Definitions.**

The term "War Prohibition Act" used in this Act shall mean the provisions of any Act or Acts prohibiting the sale and manufacture of intoxicating liquors until the conclusion of the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States. The words "beer, wine, or other intoxicating malt or vinous liquors" in the War Prohibition Act shall be hereafter construed to mean any such beverages which contain one-half of 1 per centum or more of alcohol by volume: Provided, That the foregoing definition shall not extend to dealcoholized wine nor to any beverage or liquid produced by the process by which beer, ale, porter or wine is produced, if it contains less than one-half of 1 per centum of alcohol by volume, and is made as prescribed in section 37 of Title II of this Act, and is otherwise denominated than as beer, ale, or porter, and is contained and sold in, or from, such sealed and labeled bottles, casks, or containers as the commissioner may by regulation prescribe.

§ 1361. Title I, § 2. Investigation and Report of Violations of War Prohibition Act; Duty to Prosecute; Warrants.

The Commissioner of Internal Revenue, his assistants, agents, and inspectors, shall investigate and report violations of the War Prohibition Act to the United States attorney for the district in which committed, who shall be charged with the duty of prosecuting, subject to the direction of the Attorney General, the offenders as in the case of other offenses against laws of the United States; and such Commissioner of Internal Revenue, his assistants,

§ 1359. ¹ An act to prohibit intoxicating beverages, and to regulate the manufacture, production, use, and sale of high-proof spirits for other than beverage purposes, and to insure an

ample supply of alcohol and promote its use in scientific research, and in the development of fuel, dye, and other lawful industries, passed over the President's veto.

agents, and inspectors may swear out warrants before United States commissioners or other officers or courts authorized to issue the same for the apprehension of such offenders, and may, subject to the control of the said United States attorney, conduct the prosecution at the committing trial for the purpose of having the offenders held for the action of a grand jury.

§ 1362. Title I, § 3. Public and Common Nuisances; Punishment for Maintaining; Liability of Owners of Property; Forfeiture of Leases.

Any room, house, building, boat, vehicle, structure, or place of any kind where intoxicating liquor is sold, manufactured, kept for sale, or bartered in violation of the War Prohibition Act, and all intoxicating liquor and all property kept and used in maintaining such a place, is hereby declared to be a public and common nuisance, and any person who maintains or assists in maintaining such public and common nuisance shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than \$100 nor more than \$1000, or be imprisoned for not less than thirty days or more than one year, or both. If a person has knowledge that his property is occupied or used in violation of the provisions of the War Prohibition Act and suffers the same to be so used, such property shall be subject to a lien for, and may be sold to pay, all fines and costs assessed against the occupant of such building or property for any violation of the War Prohibition Act occurring after the passage hereof, which said lien shall attach from the time of the filing of notice of the commencement of the suit in the office where the records of the transfer of real estate are kept; and any such lien may be established and enforced by legal action instituted for that purpose in any court having jurisdiction. Any violation of this title upon any leased premises by the lessee or occupant thereof shall, at the option of the lessor, work a forfeiture of the lease.

§ 1363. Title I, § 4. Abatement of Nuisances; Injunction; Procedure; Bond for Abatement; Contempt in Abatement or Injunction Proceedings.

The United States attorney for the district where such nuisance as is defined in this Act exists, or any officer

designated by him or the Attorney General of the United States, may prosecute a suit in equity in the name of the United States to abate and enjoin the same. Actions in equity to enjoin and abate such nuisances may be brought in any court having jurisdiction to hear and determine equity causes. The jurisdiction of the courts of the United States under this section shall be concurrent with that of the courts of the several States.

If it be made to appear by affidavit, or other evidence under oath, to the satisfaction of the court, or judge in vacation, that the nuisance complained of exists, a temporary writ of injunction shall forthwith issue restraining the defendant or defendants from conducting or permitting the continuance of such nuisance until the conclusion of the trial. Where a temporary injunction is prayed for, the court may issue an order restraining the defendants and all other persons from removing or in any way interfering with the liquor or fixtures, or other things used in connection with the violation constituting the nuisance. No bond shall be required as a condition for making any order or issuing any writ of injunction under this Act. If the court shall find the property involved was being unlawfully used as aforesaid at or about the time alleged in the petition, the court shall order that no liquors shall be manufactured, sold, bartered, or stored in such room, house, building, boat, vehicle, structure, or places of any kind, for a period of not exceeding one year, or during the war and the period of demobilization. Whenever an action to enjoin a nuisance shall have been brought pursuant to the provisions of this Act, if the owner, lessee, tenant, or occupant appears and pays all costs of the proceedings and files a bond, with sureties to be approved by the clerk of the court in which the action is brought, in the liquidated sum of not less than \$500 nor more than \$1000, conditioned that he will immediately abate said nuisance and prevent the same from being established or kept therein a period of one year thereafter, or during the war and period of demobilization, the court, or in vacation the judge, may, if satisfied of his good faith, direct by appropriate order that the property, if already closed or held under the order of abatement, be delivered to said owner, and said order of

abatement canceled, so far as the same may relate to said property; or if said bond be given and costs therein paid before judgment on an order of abatement, the action shall be thereby abated as to said room, house, building, boat, vehicle, structure, or place only. The release of the property under the provisions of this section shall not release it from any judgment, lien, penalty, or liability to which it may be subject by law.

In the case of the violation of any injunction, temporary or permanent, granted pursuant to the provisions of this Title, the court, or in vacation a judge thereof, may summarily try and punish the defendant. The proceedings for punishment for contempt shall be commenced by filing with the clerk of the court from which such injunction issued information under oath setting out the alleged facts constituting the violation, whereupon the court or judge shall forthwith cause a warrant to issue under which the defendant shall be arrested. The trial may be had upon affidavits, or either party may demand the production and oral examination of the witnesses. Any person found guilty of contempt under the provisions of this section shall be punished by a fine of not less than \$500 nor more than \$1000, or by imprisonment of not less than thirty days nor more than twelve months, or by both fine and imprisonment.

§ 1364. Title I, § 5. Powers Conferred to Enforce Act.

The Commissioner of Internal Revenue, his assistants, agents, and inspectors, and all other officers of the United States whose duty it is to enforce criminal laws, shall have all the power for the enforcement of the War Prohibition Act or any provisions thereof which is conferred by law for the enforcement of existing laws relating to the manufacture or sale of intoxicating liquors under the laws of the United States.

§ 1365. Title I, § 6. Partial Invalidity of Act.

If any section or provision of this Act shall be held to be invalid, it is hereby provided that all other provisions of this Act which are not expressly held to be invalid shall continue in full force and effect.

§ 1366. Title I, § 7. Acts, Orders, or Regulations not Repealed, Annulled, or Limited.

None of the provisions of this Act shall be construed to repeal any of the provisions of the "War Prohibition Act", or to limit or annul any order or regulation prohibiting the manufacture, sale, or disposition of intoxicating liquors within certain prescribed zones or districts, nor shall the provisions of this Act be construed to prohibit the use of the power of the military or naval authorities to enforce the regulations of the President or Secretary of War or Navy issued in pursuance of law, prohibiting the manufacture, use, possession, sale, or other disposition of intoxicating liquors during the period of the war and demobilization thereafter.

TITLE II

PROHIBITION OF INTOXICATING BEVERAGES

§ 1367. Title II, § 1. Definitions.

When used in Title II and Title III of this Act (1) The word "liquor" or the phrase "intoxicating liquor" shall be construed to include alcohol, brandy, whisky, rum, gin, beer, ale, porter, and wine, and in addition thereto any spirituous, vinous, malt, or fermented liquor, liquids, and compounds, whether medicated, proprietary, patented, or not, and by whatever name called, containing one-half of 1 per centum or more of alcohol by volume which are fit for use for beverage purposes: *Provided*, That the foregoing definition shall not extend to dealcoholized wine nor to any beverage or liquid produced by the process by which beer, ale, porter or wine is produced, if it contains less than one-half of 1 per centum of alcohol by volume, and is made as prescribed in section 37 of this title, and is otherwise denominated than as beer, ale, or porter, and is contained and sold in, or from, such sealed and labeled bottles, casks, or containers as the commissioner may by regulation prescribe.

(2) The word "person" shall mean and include natural persons, associations, copartnerships, and corporations.

(3) The word "commissioner" shall mean Commissioner of Internal Revenue.

(4) The term "application" shall mean a formal written request supported by a verified statement of facts showing that the commissioner may grant the request.

(5) The term "permit" shall mean a formal written authorization by the commissioner setting forth specifically therein the things that are authorized.

(6) The term "bond" shall mean an obligation authorized or required by or under this Act or any regulation, executed in such form and for such a penal sum as may be required by a court, the commissioner or prescribed by regulation.

(7) The term "regulation" shall mean any regulation prescribed by the commissioner with the approval of the Secretary of the Treasury for carrying out the provisions of this Act, and the commissioner is authorized to make such regulations.

Any act authorized to be done by the commissioner may be performed by any assistant or agent designated by him for that purpose. Records required to be filed with the commissioner may be filed with an assistant commissioner or other person designated by the commissioner to receive such records.

§ 1368. Title II, § 2. Investigation and Report of Violations of Act; Duty to Prosecute; Search Warrants.

The Commissioner of Internal Revenue, his assistants, agents, and inspectors shall investigate and report violations of this Act to the United States attorney for the district in which committed, who is hereby charged with the duty of prosecuting the offenders, subject to the direction of the Attorney General, as in the case of other offenses against the laws of the United States; and such Commissioner of Internal Revenue, his assistants, agents, and inspectors may swear out warrants before United States commissioners or other officers or courts authorized to issue the same for the apprehension of such offenders, and may, subject to the control of the said United States attorney, conduct the prosecution at the committing trial for the purpose of having the offenders held for the action of a grand jury. Section 1014 of the Revised Statutes of the United States is hereby made applicable in the enforcement of this Act. Officers

mentioned in said section 1014 are authorized to issue search warrants under the limitations provided in Title XI of the Act approved June 15, 1917 (Fortieth Statutes at Large, page 217, *et seq.*).

§ 1369. Title II, § 3. Manufacture, Sale, Transportation, Importation or Exportation, Delivery, Furnishing, or Possessing Intoxicating Liquors Prohibited ; Exceptions.

No person shall on or after the date when the eighteenth amendment to the Constitution of the United States goes into effect, manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor except as authorized in this Act, and all the provisions of this Act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented.

Liquor for non-beverage purposes and wine for sacramental purposes may be manufactured, purchased, sold, bartered, transported, imported, exported, delivered, furnished and possessed, but only as herein provided, and the commissioner may, upon application, issue permits therefor : Provided, That nothing in this Act shall prohibit the purchase and sale of warehouse receipts covering distilled spirits on deposit in Government bonded warehouses, and no special tax liability shall attach to the business of purchasing and selling such warehouse receipts.

§ 1370. Title II, § 4. Same ; Exceptions ; Permits to Manufacture Certain Articles ; Bond of Manufacturer ; Quantity of Alcohol ; Sale of Enumerated Articles for Beverage Purposes ; Punishment.

The articles enumerated in this section shall not, after having been manufactured and prepared for the market, be subject to the provisions of this Act if they correspond with the following descriptions and limitations, namely :

(a) Denatured alcohol or denatured rum produced and used as provided by laws and regulations now or hereafter in force.

(b) Medicinal preparations manufactured in accordance with formulas prescribed by the United States Pharmacopœia, National Formulary or the American Institute of Homeopathy that are unfit for use for beverage purposes.

(c) Patented, patent, and proprietary medicines that are unfit for use for beverage purposes.

(d) Toilet, medicinal, and antiseptic preparations and solutions that are unfit for use for beverage purposes.

(e) Flavoring extracts and sirups that are unfit for use as a beverage, or for intoxicating beverage purposes.

(f) Vinegar and preserved sweet cider.

A person who manufactures any of the articles mentioned in this section may purchase and possess liquor for that purpose, but he shall secure permits to manufacture such articles and to purchase such liquor, give the bonds, keep the records, and make the reports specified in this Act and as directed by the commissioner. No such manufacturer shall sell, use, or dispose of any liquor otherwise than as an ingredient of the articles authorized to be manufactured therefrom. No more alcohol shall be used in the manufacture of any extract, sirup, or the articles named in paragraphs b, c, and d of this section which may be used for beverage purposes than the quantity necessary for extraction or solution of the elements contained therein and for the preservation of the article.

Any person who shall knowingly sell any of the articles mentioned in paragraphs a, b, c, and d of this section for beverage purposes, or any extract or sirup for intoxicating beverage purposes, or who shall sell any of the same under circumstances from which the seller might reasonably deduce the intention of the purchaser to use them for such purposes, or shall sell any beverage containing one-half of 1 per centum or more of alcohol by volume in which any extract, sirup, or other article is used as an ingredient, shall be subject to the penalties provided in section 29 of this Title. If the commissioner shall find, after notice and hearing as provided for in section 5 of this Title, that any person has sold any flavoring extract, sirup, or beverage in violation of this paragraph, he shall notify such person, and any known principal for whom the sale was made, to desist from selling such article; and it shall thereupon be unlawful for a period of one year thereafter for any person so notified to sell any such extract, sirup, or beverage without making an application for, giving a bond, and obtaining a permit so to do, which permit may be issued upon such conditions

as the commissioner may deem necessary to prevent such illegal sales, and in addition the commissioner shall require a record and report of sales.

§ 1371. Title II, § 5. Analysis of Manufactured Articles; Notice to Manufacturer; Revocation of Permit.

Whenever the commissioner has reason to believe that any article mentioned in section 4 does not correspond with the descriptions and limitations therein provided, he shall cause an analysis of said article to be made, and if, upon such analysis, the commissioner shall find that said article does not so correspond, he shall give not less than fifteen days' notice in writing to the person who is the manufacturer thereof to show cause why said article should not be dealt with as an intoxicating liquor, such notice to be served personally or by registered mail, as the commissioner may determine, and shall specify the time when, the place where, and the name of the agent or official before whom such person is required to appear.

If the manufacturer of said article fails to show to the satisfaction of the commissioner that the article corresponds to the descriptions and limitations provided in section 4 of this Title, his permit to manufacture and sell such article shall be revoked. The manufacturer may by appropriate proceeding in a court of equity have the action of the commissioner reviewed, and the court may affirm, modify, or reverse the finding of the commissioner as the facts and law of the case may warrant, and during the pendency of such proceedings may restrain the manufacture, sale, or other disposition of such article.

§ 1372. Title II, § 6. Permits to Manufacture, Sell, Purchase, Transport, or Prescribe Liquors; Exceptions; Expiration of Permits; Wine for Sacramental Purposes.

No one shall manufacture, sell, purchase, transport, or prescribe any liquor without first obtaining a permit from the commissioner so to do, except that a person may, without a permit, purchase and use liquor for medicinal purposes when prescribed by a physician as herein provided, and except that any person who in the opinion of the commissioner is conducting a bona fide hospital or sana-

torium engaged in the treatment of persons suffering from alcoholism, may, under such rules, regulations, and conditions as the commissioner shall prescribe, purchase and use, in accordance with the methods in use in such institution, liquor, to be administered to the patients of such institution under the direction of a duly qualified physician employed by such institution.

All permits to manufacture, prescribe, sell, or transport liquor, may be issued for one year, and shall expire on the 31st day of December next succeeding the issuance thereof: Provided, That the commissioner may without formal application or new bond extend any permit granted under this Act or laws now in force after August 31 in any year to December 31 of the succeeding year: Provided further, That permits to purchase liquor for the purpose of manufacturing or selling as provided in this Act shall not be in force to exceed ninety days from the day of issuance. A permit to purchase liquor for any other purpose shall not be in force to exceed thirty days. Permits to purchase liquor shall specify the quantity and kind to be purchased and the purpose for which it is to be used. No permit shall be issued to any person who within one year prior to the application therefor or issuance thereof shall have violated the terms of any permit issued under this Title or any law of the United States or of any State regulating traffic in liquor. No permit shall be issued to anyone to sell liquor at retail, unless the sale is to be made through a pharmacist designated in the permit and duly licensed under the laws of his State to compound and dispense medicine prescribed by a duly licensed physician. No one shall be given a permit to prescribe liquor unless he is a physician duly licensed to practice medicine and actively engaged in the practice of such profession. Every permit shall be in writing, dated when issued, and signed by the commissioner or his authorized agent. It shall give the name and address of the person to whom it is issued and shall designate and limit the acts that are permitted and the time when and place where such acts may be performed. No permit shall be issued until a verified, written application shall have been made therefor, setting forth the qualification of the applicant and the purpose for which the liquor is to be used.

The commissioner may prescribe the form of all permits and applications and the facts to be set forth therein. Before any permit is granted the commissioner may require a bond in such form and amount as he may prescribe to insure compliance with the terms of the permit and the provisions of this title. In the event of the refusal by the commissioner of any application for a permit, the applicant may have a review of his decision before a court of equity in the manner provided in section 5 hereof.

Nothing in this title shall be held to apply to the manufacture, sale, transportation, importation, possession, or distribution of wine for sacramental purposes, or like religious rites, except section 6 (save as the same requires a permit to purchase) and section 10 hereof, and the provisions of this Act prescribing penalties for the violation of either of said sections. No person to whom a permit may be issued to manufacture, transport, import, or sell wines for sacramental purposes or like religious rites shall sell, barter, exchange, or furnish any such to any person not a rabbi, minister of the gospel, priest, or an officer duly authorized for the purpose by any church or congregation, nor to any such except upon an application duly subscribed by him, which application, authenticated as regulations may prescribe, shall be filed and preserved by the seller. The head of any conference or diocese or other ecclesiastical jurisdiction may designate any rabbi, minister, or priest to supervise the manufacture of wine to be used for the purposes and rites in this section mentioned, and the person so designated may, in the discretion of the commissioner, be granted a permit to supervise such manufacture.

§ 1373. Title II, § 7. Physicians' Prescriptions.

No one but a physician holding a permit to prescribe liquor shall issue any prescription for liquor. And no physician shall prescribe liquor unless after careful physical examination of the person for whose use such prescription is sought, or if such examination is found impracticable, then upon the best information obtainable, he in good faith believes that the use of such liquor as a medicine by such person is necessary and will afford relief to him from some

known ailment. Not more than a pint of spirituous liquor to be taken internally shall be prescribed for use by the same person within any period of ten days and no prescription shall be filled more than once. Any pharmacist filling a prescription shall at the time indorse upon it over his own signature the word "canceled", together with the date when the liquor was delivered, and then make the same a part of the record that he is required to keep as herein provided.

Every physician who issues a prescription for liquor shall keep a record, alphabetically arranged in a book prescribed by the commissioner, which shall show the date of issue, amount prescribed, to whom issued, the purpose or ailment for which it is to be used and directions for use, stating the amount and frequency of the dose.

§ 1374. Title II, § 8. Blanks for.

The commissioner shall cause to be printed blanks for the prescriptions herein required, and he shall furnish the same, free of cost, to physicians holding permits to prescribe. The prescription blanks shall be printed in book form and shall be numbered consecutively from one to one hundred, and each book shall be given a number, and the stubs in each book shall carry the same numbers as and be copies of the prescriptions. The books containing such stubs shall be returned to the commissioner when the prescription blanks have been used, or sooner, if directed by the commissioner. All unused, mutilated, or defaced blanks shall be returned with the book. No physician shall prescribe and no pharmacist shall fill any prescription for liquor except on blanks so provided, except in cases of emergency, in which event a record and report shall be made and kept as in other cases.

§ 1375. Title II, § 9. Violations of Law by Permittee; Citation; Hearing; Revocation of Permit.

If any time there shall be filed with the commissioner a complaint under oath setting forth facts showing, or if the commissioner has reason to believe, that any person who has a permit is not in good faith conforming to the provisions of this Act, or has violated the laws of any

State relating to intoxicating liquor, the commissioner or his agent shall immediately issue an order citing such person to appear before him on a day named not more than thirty and not less than fifteen days from the date of service upon such permittee of a copy of the citation, which citation shall be accompanied by a copy of such complaint, or in the event that the proceedings be initiated by the commissioner with a statement of the facts constituting the violation charged, at which time a hearing shall be had unless continued for cause. Such hearings shall be held within the judicial district and within fifty miles of the place where the offense is alleged to have occurred, unless the parties agree on another place. If it be found that such person has been guilty of willfully violating any such laws, as charged, or has not in good faith conformed to the provisions of this Act, such permit shall be revoked, and no permit shall be granted to such person within one year thereafter. Should the permit be revoked by the commissioner, the permittee may have a review of his decision before a court of equity in the manner provided in section 5 hereof. During the pendency of such action such permit shall be temporarily revoked.

§ 1376. Title II, § 10. Record of Manufacture, Purchase, Sale, or Transportation of Liquor.

No person shall manufacture, purchase for sale, sell, or transport any liquor without making at the time a permanent record thereof showing in detail the amount and kind of liquor manufactured, purchased, sold, or transported, together with the names and addresses of the persons to whom sold, in case of sale, and the consignor and consignee in case of transportation, and the time and place of such manufacture, sale, or transportation. The commissioner may prescribe the form of such record, which shall at all times be open to inspection as in this Act provided.

§ 1377. Title II, § 11. Copies of Permits to Be Kept by Manufacturers and Wholesalers; Sales Only at Wholesale.

All manufacturers and wholesale or retail druggists shall keep as a part of the records required of them a copy of all permits to purchase on which a sale of any liquor is

made, and no manufacturer or wholesale druggist shall sell or otherwise dispose of any liquor except at wholesale and only to persons having permits to purchase in such quantities.

§ 1378. Title II, § 12. Labels on Containers.

All persons manufacturing liquor for sale under the provisions of this title shall securely and permanently attach to every container thereof, as the same is manufactured, a label stating name of manufacturer, kind and quantity of liquor contained therein, and the date of its manufacture, together with the number of the permit authorizing the manufacture thereof; and all persons possessing such liquor in wholesale quantities shall securely keep and maintain such label thereon; and all persons selling at wholesale shall attach to every package of liquor, when sold, a label setting forth the kind and quantity of liquor contained therein, by whom manufactured, the date of sale, and the person to whom sold; which label shall likewise be kept and maintained thereon until the liquor is used for the purpose for which such sale was authorized.

§ 1379. Title II, § 13. Records of Carriers; Verification of Copies of Permits.

It shall be the duty of every carrier to make a record at the place of shipment of the receipt of any liquor transported, and he shall deliver liquor only to persons who present to the carrier a verified copy of a permit to purchase which shall be made a part of the carrier's permanent record at the office from which delivery is made.

The agent of the common carrier is hereby authorized to administer the oath to the consignee in verification of the copy of the permit presented, who, if not personally known to the agent, shall be identified before the delivery of the liquor to him. The name and address of the person identifying the consignee shall be included in the record.

§ 1380. Title II, § 14. Notice to Carrier of Nature of Shipments; Information on Packages.

It shall be unlawful for a person to use or induce any carrier, or any agent or employee thereof, to carry or ship

any package or receptacle containing liquor without notifying the carrier of the true nature and character of the shipment. No carrier shall transport nor shall any person receive liquor from a carrier unless there appears on the outside of the package containing such liquor the following information :

Name and address of the consignor or seller, name and address of the consignee, kind and quantity of liquor contained therein, and number of the permit to purchase or ship the same, together with the name and address of the person using the permit.

§ 1381. Title II, § 15. Consigning, Shipping, Transporting, Delivering, or Receiving Packages with False Statements Thereon.

It shall be unlawful for any consignee to accept or receive any package containing any liquor upon which appears a statement known to him to be false, or for any carrier or other person to consign, ship, transport, or deliver any such package, knowing such statement to be false.

§ 1382. Title II, § 16. Orders to Carrier for Delivery to Persons not Actual Bona Fide Consignees.

It shall be unlawful to give to any carrier or any officer, agent, or person acting or assuming to act for such carrier an order requiring the delivery to any person of any liquor or package containing liquor consigned to, or purporting or claimed to be consigned to a person, when the purpose of the order is to enable any person not an actual bona fide consignee to obtain such liquor.

§ 1383. Title II, § 17. Advertising Liquor or Manufacture, Sale, or Keeping for Sale Thereof ; Exceptions.

It shall be unlawful to advertise anywhere, or by any means or method, liquor, or the manufacture, sale, keeping for sale or furnishing of the same, or where, how, from whom, or at what price the same may be obtained. No one shall permit any sign or billboard containing such advertisement to remain upon one's premises. But nothing herein shall prohibit manufacturers and wholesale druggists holding permits to sell liquor from furnishing price lists, with description of liquor for sale, to persons

permitted to purchase liquor, or from advertising alcohol in business publications or trade journals circulating generally among manufacturers of lawful alcoholic perfumes, toilet preparations, flavoring extracts, medicinal preparations, and like articles: Provided, however, That nothing in this Act or in the Act making appropriations for the Post Office Department, approved March 3, 1917 (Thirty-ninth Statutes at Large, Part 1, page 1058, et seq.), shall apply to newspapers published in foreign countries when mailed to this country.

§ 1384. Title II, § 18. Advertising, Manufacturing, or Sale of Utensils, Apparatus, Ingredients or Formulæ for Manufacture of Liquor.

It shall be unlawful to advertise, manufacture, sell, or possess for sale any utensil, contrivance, machine, preparation, compound, tablet, substance, formula direction, or recipe advertised, designed, or intended for use in the unlawful manufacture of intoxicating liquor.

§ 1385. Title II, § 19. Soliciting or Receiving Orders for Liquor.

No person shall solicit or receive, nor knowingly permit his employee to solicit or receive, from any person any order for liquor or give any information of how liquor may be obtained in violation of this Act.

§ 1386. Title II, § 20. Right of Action for Injuries Caused by Intoxicated Persons.

Any person who shall be injured in person, property, means of support, or otherwise by any intoxicated person, or by reason of the intoxication of any person, whether resulting in his death or not, shall have a right of action against any person who shall, by unlawfully selling to or unlawfully assisting in procuring liquor for such intoxicated person, have caused or contributed to such intoxication, and in any such action such person shall have a right to recover actual and exemplary damages. In case of the death of either party, the action or right of action given by this section shall survive to or against his or her executor or administrator, and the amount so recovered by either wife or child shall be his or her sole and separate property.

Such action may be brought in any court of competent jurisdiction. In any case where parents shall be entitled to such damages, either the father or mother may sue alone therefor, but recovery by one of such parties shall be a bar to suit brought by the other.

§ 1387. Title II, § 21. Common Nuisance ; What Are ; Punishment for Maintenance ; Liability of Owners of Buildings.

Any room, house, building, boat, vehicle, structure, or place where intoxicating liquor is manufactured, sold, kept, or bartered in violation of this title, and all intoxicating liquor and property kept and used in maintaining the same, is hereby declared to be a common nuisance, and any person who maintains such a common nuisance shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than \$1000 or be imprisoned for not more than one year, or both. If a person has knowledge or reason to believe that his room, house, building, boat, vehicle, structure, or place is occupied or used for the manufacture or sale of liquor contrary to the provision of this title, and suffers the same to be so occupied or used, such room, house, building, boat, vehicle, structure, or place shall be subject to a lien for and may be sold to pay all fines and costs assessed against the person guilty of such nuisance for such violation, and any such lien may be enforced by action in any court having jurisdiction.

§ 1388. Title II, § 22. Same ; Injunction ; Procedure ; Abatement ; Bond by Owner or Lessee of Building.

An action to enjoin any nuisance defined in this title may be brought in the name of the United States by the Attorney General of the United States or by any United States attorney or any prosecuting attorney of any State or any subdivision thereof or by the commissioner or his deputies or assistants. Such action shall be brought and tried as an action in equity and may be brought in any court having jurisdiction to hear and determine equity cases. If it is made to appear by affidavits or otherwise, to the satisfaction of the court, or judge in vacation, that such nuisance exists, a temporary writ of injunction shall forthwith issue restraining the defendant from conducting or permitting the

continuance of such nuisance until the conclusion of the trial. If a temporary injunction is prayed for, the court may issue an order restraining the defendant and all other persons from removing or in any way interfering with liquor or fixtures, or other things used in connection with the violation of this Act constituting such nuisance. No bond shall be required in instituting such proceedings. It shall not be necessary for the court to find the property involved was being unlawfully used as aforesaid at the time of the hearing, but on finding that the material allegations of the petition are true, the court shall order that no liquors shall be manufactured, sold, bartered, or stored in such room, house, building, boat, vehicle, structure, or place, or any part thereof. And upon judgment of the court ordering such nuisance to be abated, the court may order that the room, house, building, structure, boat, vehicle, or place shall not be occupied or used for one year thereafter; but the court may, in its discretion, permit it to be occupied or used if the owner, lessee, tenant, or occupant thereof shall give bond with sufficient surety, to be approved by the court making the order, in the penal and liquidated sum of not less than \$500 nor more than \$1000, payable to the United States, and conditioned that intoxicating liquor will not thereafter be manufactured, sold, bartered, kept, or otherwise disposed of therein or thereon, and that he will pay all fines, costs, and damages that may be assessed for any violation of this title upon said property.

§ 1389. Title II, § 23. Nuisances; Keeping or Carrying Liquor with Intent to Sell or Soliciting Orders for Liquor; Injunction; Liability of Lessees.

Any person who shall, with intent to effect a sale of liquor, by himself, his employee, servant, or agent, for himself or any person, company or corporation, keep or carry around on his person, or in a vehicle, or other conveyance whatever, or leave in a place for another to secure, any liquor, or who shall travel to solicit, or solicit, or take, or accept orders for the sale, shipment, or delivery of liquor in violation of this title is guilty of a nuisance and may be restrained by injunction, temporary and permanent, from doing or continuing to do any of said acts or things.

In such proceedings it shall not be necessary to show any intention on the part of the accused to continue such violations if the action is brought within sixty days following any such violation of the law.

For removing and selling property in enforcing this Act the officer shall be entitled to charge and receive the same fee as the sheriff of the county would receive for levying upon and selling property under execution, and for closing the premises and keeping them closed a reasonable sum shall be allowed by the court.

Any violation of this title upon any leased premises by the lessee or occupant thereof shall, at the option of the lessor, work a forfeiture of the lease.

§ 1390. Title II, § 24. Violations of Injunctions; Contempt; Procedure.

In the case of the violation of any injunction, temporary or permanent, granted pursuant to the provisions of this title, the court, or in vacation a judge thereof, may summarily try and punish the defendant. The proceedings for punishment for contempt shall be commenced by filing with the clerk of the court from which such injunction issued information under oath setting out the alleged facts constituting the violation, whereupon the court or judge shall forthwith cause a warrant to issue under which the defendant shall be arrested. The trial may be had upon affidavits, or either party may demand the production and oral examination of the witnesses. Any person found guilty of contempt under the provisions of this section shall be punished by a fine of not less than \$500 nor more than \$1000, or by imprisonment of not less than thirty days nor more than twelve months, or by both fine and imprisonment.

§ 1391. Title II, § 25. Unlawful Possession of Liquor; Search Warrants.

It shall be unlawful to have or possess any liquor or property designed for the manufacture of liquor intended for use in violating this title or which has been so used, and no property rights shall exist in any such liquor or property. A search warrant may issue as provided in Title XI of public

law numbered 24 of the Sixty-Fifth Congress, approved June 15, 1917, and such liquor, the containers thereof, and such property so seized shall be subject to such disposition as the court may make thereof. If it is found that such liquor or property was so unlawfully held or possessed, or had been so unlawfully used, the liquor, and all property designed for the unlawful manufacture of liquor, shall be destroyed, unless the court shall otherwise order. No search warrant shall issue to search any private dwelling occupied as such unless it is being used for the unlawful sale of intoxicating liquor, or unless it is in part used for some business purpose such as a store, shop, saloon, restaurant, hotel, or boarding house. The term "private dwelling" shall be construed to include the room or rooms used and occupied not transiently but solely as a residence in an apartment house, hotel, or boarding house. The property seized on any such warrant shall not be taken from the officer seizing the same on any writ of replevin or other like process.

§ 1392. Title II, § 26. Unlawful Transportation of Liquor or Apparatus; Seizure and Destruction of Liquor and Sale of Apparatus.

When the commissioner, his assistants, inspectors, or any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof. Such officer shall at once proceed against the person arrested under the provisions of this title in any court having competent jurisdiction; but the said vehicle or conveyance shall be returned to the owner upon execution by him of a good and valid bond, with sufficient sureties, in a sum double the value of the property, which said bond shall be approved by said officer and shall be conditioned to return said property to the custody of said

officer on the day of trial to abide the judgment of the court. The court upon conviction of the person so arrested shall order the liquor destroyed, and unless good cause to the contrary is shown by the owner, shall order a sale by public auction of the property seized, and the officer making the sale, after deducting the expenses of keeping the property, the fee for the seizure, and the cost of the sale, shall pay all liens, according to their priorities, which are established, by intervention or otherwise at said hearing or in other proceeding brought for said purpose, as being bona fide and as having been created without the lienor having any notice that the carrying vehicle was being used or was to be used for illegal transportation of liquor, and shall pay the balance of the proceeds into the Treasury of the United States as miscellaneous receipts. All liens against property sold under the provisions of this section shall be transferred from the property to the proceeds of the sale of the property. If, however, no one shall be found claiming the team, vehicle, water or air craft, or automobile, the taking of the same, with a description thereof, shall be advertised in some newspaper published in the city or county where taken or if there be no newspaper published in such city or county, in a newspaper having circulation in the county, once a week for two weeks and by handbills posted in three public places near the place of seizure, and if no claimant shall appear within ten days after the last publication of the advertisement, the property shall be sold and the proceeds after deducting the expenses and costs shall be paid into the Treasury of the United States as miscellaneous receipts.

§ 1393. Title II, § 27. Delivery of Seized Liquors to United States for Certain Purposes.

In all cases in which intoxicating liquors may be subject to be destroyed under the provisions of this Act the court shall have jurisdiction upon the application of the United States attorney to order them delivered to any department or agency of the United States Government for medicinal, mechanical, or scientific uses, or to order the same sold at private sale for such purposes to any person having a permit to purchase liquor the proceeds to be covered into

the Treasury of the United States to the credit of miscellaneous receipts, and all liquor heretofore seized in any suit or proceeding brought for violation of law may likewise be so disposed of, if not claimed within sixty days from the date this section takes effect.

§ 1394. Title II, § 28. Powers of and Protection to Internal Revenue Officers.

The commissioner, his assistants, agents, and inspectors, and all other officers of the United States, whose duty it is to enforce criminal laws, shall have all the power and protection in the enforcement of this Act or any provisions thereof which is conferred by law for the enforcement of existing laws relating to the manufacture or sale of intoxicating liquors under the law of the United States.

§ 1395. Title II, § 29. Unlawful Manufacture or Sale of Liquor; Punishment; Violations of Permits; Punishment.

Any person who manufactures or sells liquor in violation of this title shall for a first offense be fined not more than \$1000, or imprisoned not exceeding six months, and for a second or subsequent offense shall be fined not less than \$200 nor more than \$2000 and be imprisoned not less than one month nor more than five years.

Any person violating the provisions of any permit, or who makes any false record, report, or affidavit required by this title, or violates any of the provisions of this title, for which offense a special penalty is not prescribed, shall be fined for a first offense not more than \$500; for a second offense not less than \$100 nor more than \$1000, or be imprisoned not more than ninety days; for any subsequent offense he shall be fined not less than \$500 and be imprisoned not less than three months nor more than two years. It shall be the duty of the prosecuting officer to ascertain whether the defendant has been previously convicted and to plead the prior conviction in the affidavit, information, or indictment. The penalties provided in this Act against the manufacture of liquor without a permit shall not apply to a person for manufacturing nonintoxicating cider and fruit juices exclusively for use in his home, but such cider and fruit juices shall not be

sold or delivered except to persons having permits to manufacture vinegar.

§ 1396. Title II, § 30. Privilege of Witnesses; Immunity from Prosecution.

No person shall be excused, on the ground that it may tend to incriminate him or subject him to a penalty or forfeiture, from attending and testifying, or producing books, papers, documents, and other evidence in obedience to a subpoena of any court in any suit or proceeding based upon or growing out of any alleged violation of this Act; but no natural person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing as to which, in obedience to a subpoena and under oath, he may so testify or produce evidence, but no person shall be exempt from prosecution and punishment for perjury committed in so testifying.

§ 1397. Title II, § 31. Place of Delivery of Liquor Sold.

In case of a sale of liquor where the delivery thereof was made by a common or other carrier the sale and delivery shall be deemed to be made in the county or district wherein the delivery was made by such carrier to the consignee, his agent or employee, or in the county or district wherein the sale was made, or from which the shipment was made, and prosecution for such sale or delivery may be had in any such county or district.

§ 1398. Title II, § 32. Affidavits, Information or Indictments; Joinder of Separate Offenses.

In any affidavit, information, or indictment for the violation of this Act, separate offenses may be united in separate counts and the defendant may be tried on all at one trial and the penalty for all offenses may be imposed. It shall not be necessary in any affidavit, information, or indictment to give the name of the purchaser or to include any defensive negative averments, but it shall be sufficient to state that the act complained of was then and there prohibited and unlawful, but this provision shall not be construed to preclude the trial court from directing the furnishing the defendant a bill of particulars when it deems it proper to do so.

§ 1399. Title II, § 33. Possession of Liquor Prima Facie Evidence of Unlawful Purpose ; Reports of Possession ; Exception.

After February 1, 1920, the possession of liquors by any person not legally permitted under this title to possess liquor shall be prima facie evidence that such liquor is kept for the purpose of being sold, bartered, exchanged, given away, furnished, or otherwise disposed of in violation of the provisions of this title. Every person legally permitted under this title to have liquor shall report to the commissioner within ten days after the date when the eighteenth amendment of the Constitution of the United States goes into effect, the kind and amount of intoxicating liquors in his possession. But it shall not be unlawful to possess liquors in one's private dwelling while the same is occupied and used by him as his dwelling only and such liquor need not be reported, provided such liquors are for use only for the personal consumption of the owner thereof and his family residing in such dwelling and of his bona fide guests when entertained by him therein ; and the burden of proof shall be upon the possessor in any action concerning the same to prove that such liquor was lawfully acquired, possessed, and used.

§ 1400. Title II, § 34. Records and Reports ; Inspection ; Use as Evidence.

All records and reports kept or filed under the provisions of this Act shall be subject to inspection at any reasonable hour by the commissioner or any of his agents or by any public prosecutor or by any person designated by him, or by any peace officer in the State where the record is kept, and copies of such records and reports duly certified by the person with whom kept or filed may be introduced in evidence with like effect as the originals thereof, and verified copies of such records shall be furnished to the commissioner when called for.

§ 1401. Title II, § 35. Repeal ; Tax on Liquors ; Compromise of Civil Actions.

All provisions of law that are inconsistent with this Act are repealed only to the extent of such inconsistency and the regulations herein provided for the manufacture or traffic

in intoxicating liquor shall be construed as in addition to existing laws. This Act shall not relieve anyone from paying any taxes or other charges imposed upon the manufacture or traffic in such liquor. No liquor revenue stamps or tax receipts for any illegal manufacture or sale shall be issued in advance, but upon evidence of such illegal manufacture or sale a tax shall be assessed against, and collected from, the person responsible for such illegal manufacture or sale in double the amount now provided by law, with an additional penalty of \$500 on retail dealers and \$1000 on manufacturers. The payment of such tax or penalty shall give no right to engage in the manufacture or sale of such liquor, or relieve anyone from criminal liability, nor shall this Act relieve any person from any liability, civil or criminal, heretofore or hereafter incurred under existing laws.

The commissioner, with the approval of the Secretary of the Treasury, may compromise any civil cause arising under this title before bringing action in court; and with the approval of the Attorney General he may compromise any such cause after action thereon has been commenced.

§ 1402. Title II, § 36. Partial Invalidity of Act.

If any provision of this Act shall be held invalid it shall not be construed to invalidate other provisions of the Act.

§ 1403. Title II, § 37. Storage or Transportation of Liquor in or to Bonded Warehouses; Development of Liquids to Contain More than $\frac{1}{2}$ of One Per Centum of Alcohol; Reduction of Same; Tax on Fortified Wines for Non-Beverage Alcohol; Burden of Proof as to Volume of Alcohol.

Nothing herein shall prevent the storage in United States bonded warehouses of all liquor manufactured prior to the taking effect of this Act, or prevent the transportation of such liquor to such warehouses or to any wholesale druggist for sale to such druggist for purposes not prohibited when the tax is paid, and permits may be issued therefor.

A manufacturer of any beverage containing less than one-half of 1 per centum of alcohol by volume may, on making application and giving such bond as the com-

missioner shall prescribe, be given a permit to develop in the manufacture thereof by the usual methods of fermentation and fortification or otherwise a liquid such as beer, ale, porter, or wine, containing more than one-half of 1 per centum of alcohol by volume, but before any such liquid is withdrawn from the factory or otherwise disposed of the alcoholic contents thereof shall under such rules and regulations as the commissioner may prescribe be reduced below such one-half of 1 per centum of alcohol: Provided, That such liquid may be removed and transported, under bond and under such regulations as the commissioner may prescribe, from one bonded plant or warehouse to another for the purpose of having the alcohol extracted therefrom. And such liquids may be developed, under permit, by persons other than the manufacturers of beverages containing less than one-half of 1 per centum of alcohol by volume, and sold to such manufacturers for conversion into such beverages. The alcohol removed from such liquid, if evaporated and not condensed and saved, shall not be subject to tax; if saved, it shall be subject to the same law as other alcoholic liquors. Credit shall be allowed on the tax due on any alcohol so saved to the amount of any tax paid upon distilled spirits or brandy used in the fortification of the liquor from which the same is saved.

When fortified wines are made and used for the production of non-beverage alcohol, and dealcoholized wines containing less than one-half of 1 per centum of alcohol by volume, no tax shall be assessed or paid on the spirits used in such fortification, and such dealcoholized wines produced under the provisions of this Act, whether carbonated or not, shall not be subject to the tax on artificially carbonated or sparkling wines, but shall be subject to the tax on still wines only.

In any case where the manufacturer is charged with manufacturing or selling for beverage purposes any malt, vinous, or fermented liquids containing one-half of 1 per centum or more of alcohol by volume, or in any case where the manufacturer, having been permitted by the commissioner to develop a liquid such as ale, beer, porter, or wine containing more than one-half of 1 per centum of al-

cohol by volume in the manner and for the purpose herein provided, is charged with failure to reduce the alcoholic content of any such liquid below such one-half of 1 per centum before withdrawing the same from the factory, then in either such case the burden of proof shall be on such manufacturer to show that such liquid so manufactured, sold, or withdrawn contains less than one-half of 1 per centum of alcohol by volume. In any suit or proceeding involving the alcoholic content of any beverage, the reasonable expense of analysis of such beverage shall be taxed as costs in the case.

§ 1404. Title II, § 38. Employees and Equipment for Enforcement of Act; Appointment and Purchase; Appropriation.

The Commissioner of Internal Revenue and the Attorney General of the United States are hereby respectively authorized to appoint and employ such assistants, experts, clerks, and other employees in the District of Columbia or elsewhere, and to purchase such supplies and equipment as they may deem necessary for the enforcement of the provisions of this Act, but such assistants, experts, clerks, and other employees, except such executive officers as may be appointed by the Commissioner or the Attorney General to have immediate direction of the enforcement of the provisions of this Act, and persons authorized to issue permits, and agents and inspectors in the field service, shall be appointed under the rules and regulations prescribed by the Civil Service Act: Provided, That the Commissioner and Attorney General in making such appointments shall give preference to those who have served in the military or naval service in the recent war, if otherwise qualified, and there is hereby authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, such sum as may be required for the enforcement of this Act including personal services in the District of Columbia, and for the fiscal year ending June 30, 1920, there is hereby appropriated, out of any money in the Treasury not otherwise appropriated, the sum of \$2,000,000 for the use of the Commissioner of Internal Revenue and \$100,000 for the use of the Department of Justice for the enforcement of the provisions of this Act, including personal services

in the District of Columbia and necessary printing and binding.

§ 1405. Title II, § 39. Summons to Citizens Whose Property Rights May Be Affected.

In all cases wherein the property of any citizen is proceeded against or wherein a judgment affecting it might be rendered, and the citizen is not the one who in person violated the provisions of the law, summons must be issued in due form and served personally, if said person is to be found within the jurisdiction of the court.

TITLE III

INDUSTRIAL ALCOHOL

§ 1406. Title III, § 1. Definitions.

When used in this title —

The term “alcohol” means that substance known as ethyl alcohol, hydrated oxide of ethyl, or spirit of wine, from whatever source or whatever processes produced.

The term “container” includes any receptacle, vessel or form of package, tank, or conduit used or capable of use for holding, storing, transferring, or shipment of alcohol.

Industrial Alcohol Plants and Warehouses

§ 1407. Title III, § 2. Registration of Plants and Warehouses ; Applications ; Bonds ; Permits.

Any person now producing alcohol shall, within thirty days after the passage of this Act, make application to the commissioner for registration of his industrial alcohol plant, and as soon thereafter as practicable the premises shall be bonded and permit may issue for the operation of such plant, and any person hereafter establishing a plant for the production of alcohol shall likewise before operation make application, file bond, and receive permit.

§ 1408. Title III, § 3. Establishment of Warehouses.

Warehouses for the storage and distribution of alcohol to be used exclusively for other than beverage purposes may be established upon filing of application and bond, and

issuance of permit at such places, either in connection with the manufacturing plant or elsewhere, as the commissioner may determine; and the entry and storage of alcohol therein, and the withdrawals of alcohol therefrom, shall be made in such containers and by such means as the commissioner by regulation may prescribe.

§ 1409. Title III, § 4. Transfer of Alcohol to Other Plants or Warehouses.

Alcohol produced at any registered industrial alcohol plant or stored in any bonded warehouse may be transferred under regulations to any other registered industrial alcohol plant or bonded warehouse for any lawful purpose.

§ 1410. Title III, § 5. Tax on Alcohol.

Any tax imposed by law upon alcohol shall attach to such alcohol as soon as it is in existence as such, and all proprietors of industrial alcohol plants and bonded warehouses shall be jointly and severally liable for any and all taxes on any and all alcohol produced thereat or stored therein. Such taxes shall be a first lien on such alcohol and the premises and plant in which such alcohol is produced or stored, together with all improvements and appurtenances thereunto belonging or in any wise appertaining.

§ 1411. Title III, § 6. Withdrawal of Distilled Spirits from Bonded Warehouses for Denaturing or Deposit in Warehouse Established under Act.

Any distilled spirits produced and fit for beverage purposes remaining in any bonded warehouse on or before the date when the eighteenth amendment of the Constitution of the United States goes into effect, may, under regulations, be withdrawn therefrom either for denaturation at any bonded denaturing plant or for deposit in a bonded warehouse established under this Act; and when so withdrawn, if not suitable as to proof, purity, or quality for other than beverage purposes, such distilled spirits shall be redistilled, purified, and changed in proof so as to render such spirits suitable for other purposes, and having been so treated may thereafter be denatured or sold in accordance with the provisions of this Act.

§ 1412. Title III, § 7. Operation of Distillery or Bonded Warehouse as Industrial Alcohol Plant or Bonded Warehouse Therefor.

Any distillery or bonded warehouse heretofore legally established may, upon filing application and bond and the granting of permit, be operated as an industrial alcohol plant or bonded warehouse under the provisions of this title and regulations made thereunder.

§ 1413. Title III, § 8. Production, Use or Sale of Alcohol.

Alcohol may be produced at any industrial alcohol plant established under the provisions of this title, from any raw materials or by any processes suitable for the production of alcohol, and, under regulations, may be used at any industrial alcohol plant or bonded warehouse or sold or disposed of for any lawful purpose, as in this Act provided.

§ 1414. Title III, § 9. Exemption of Plants and Warehouses from Certain Laws.

Industrial alcohol plants and bonded warehouses established under the provisions of this title shall be exempt from the provisions of sections 3154, 3244, 3258, 3259, 3260, 3263, 3264, 3266, 3267, 3268, 3269, 3271, 3273, 3274, 3275, 3279, 3280, 3283, 3284, 3285, 3286, 3287, 3288, 3289, 3290, 3291, 3292, 3293, 3294, 3295, 3302, 3303, 3307, 3308, 3309, 3310, 3311, 3312, 3313, 3314, and 3327 of the Revised Statutes; sections 48 to 60, inclusive, and sections 62 and 67 of the Act of August 27, 1894 (Twenty-eighth Statutes, pages 563 to 568), and from such other provisions of existing laws relating to distilleries and bonded warehouses as may, by regulations, be declared inapplicable to industrial alcohol plants and bonded warehouses established under this Act.

Regulations may be made embodying any provision of the sections above enumerated.

Tax-free Alcohol

§ 1415. Title III, § 10. Denatured Alcohol; Denaturing Plants; Tax.

Upon the filing of application and bond and issuance of permit denaturing plants may be established upon the

premises of any industrial alcohol plant, or elsewhere, and shall be used exclusively for the denaturation of alcohol by the admixture of such denaturing materials as shall render the alcohol, or any compound in which it is authorized to be used, unfit for use as an intoxicating beverage.

Alcohol lawfully denatured may, under regulations, be sold free of tax either for domestic use or for export.

Nothing in this Act shall be construed to require manufacturers of distilled vinegar to raise the proof of any alcohol used in such manufacture or to denature the same.

§ 1416. Title III, § 11. Withdrawal of Alcohol Tax Free for Denaturing and Other Enumerated Purposes.

Alcohol produced at any industrial alcohol plant or stored in any bonded warehouse may, under regulations, be withdrawn tax free as provided by existing law from such plant or warehouse for transfer to any denaturing plant for denaturation, or may, under regulations, before or after denaturation, be removed from any such plant or warehouse for any lawful tax-free purpose.

Spirits of less proof than one hundred and sixty degrees may, under regulations, be deemed to be alcohol for the purpose of denaturation, under the provisions of this title.

Alcohol may be withdrawn, under regulations, from any industrial plant or bonded warehouse tax free by the United States or any governmental agency thereof, or by the several States and Territories or any municipal subdivision thereof or by the District of Columbia, or for the use of any scientific university or college of learning, any laboratory for use exclusively in scientific research, or for use in any hospital or sanatorium.

But any person permitted to obtain alcohol tax free, except the United States and the several States and Territories and subdivisions thereof, and the District of Columbia, shall first apply for and secure a permit to purchase the same and give the bonds prescribed under title II of this Act, but alcohol withdrawn for nonbeverage purposes for use of the United States and the several States, Territories and subdivisions thereof, and the District of Columbia, may be purchased and withdrawn subject only to such regulations as may be prescribed.

*General Provisions***§ 1417. Title III, § 12. Penalties Additional to Other Penalties.**

The penalties provided in this title shall be in addition to any penalties provided in title 2 of this Act, unless expressly otherwise therein provided.

§ 1418. Title III, § 13. Regulations for Establishment, Bonding and Operation of Industrial Alcohol Plants, Denaturing Plants, and Bonded Warehouses.

The commissioner shall from time to time issue regulations respecting the establishment, bonding, and operation of industrial alcohol plants, denaturing plants, and bonded warehouses authorized herein, and the distribution, sale, export, and use of alcohol which may be necessary, advisable, or proper, to secure the revenue, to prevent diversion of the alcohol to illegal uses, and to place the nonbeverage alcohol industry and other industries using such alcohol as a chemical raw material or for other lawful purposes upon the highest possible plane of scientific and commercial efficiency consistent with the interests of the Government, and which shall insure an ample supply of such alcohol and promote its use in scientific research and the development of fuels, dyes, and other lawful products.

§ 1419. Title III, § 14. Refund of Tax on Alcohol for Loss, Evaporation, Shrinkage or Leakage.

Whenever any alcohol is lost by evaporation or other shrinkage, leakage, casualty, or unavoidable cause during distillation, redistillation, denaturation, withdrawal, piping, shipment, warehousing, storage, packing, transfer, or recovery, of any such alcohol the commissioner may remit or refund any tax incurred under existing law upon such alcohol, provided he is satisfied that the alcohol has not been diverted to any illegal use: Provided, also, That such allowance shall not be granted if the person claiming same is indemnified against such loss by a valid claim of insurance.

§ 1420. Title III, § 15. Unlawful Operation of Industrial Alcohol Plant or Denaturing Plant; Punishment.

Whoever operates an industrial alcohol plant or a denaturing plant without complying with the provisions of

this title and lawful regulations made thereunder, or whoever withdraws or attempts to withdraw or secure tax free any alcohol subject to tax, or whoever otherwise violates any of the provisions of this title or of regulations lawfully made thereunder shall be liable, for the first offense, to a penalty of not exceeding \$1000, or imprisonment not exceeding thirty days, or both, and for a second or cognate offense to a penalty of not less than \$100 nor more than \$10,000, and to imprisonment of not less than thirty days nor more than one year. It shall be lawful for the commissioner in all cases of second or cognate offense to refuse to issue for a period of one year a permit for the manufacture or use of alcohol upon the premises of any person responsible in any degree for the violation.

§ 1421. Title III, § 16. Collection of Tax upon Alcohol.

Any tax payable upon alcohol under existing law may be collected either by assessment or by stamp as regulations shall provide; and if by stamp, regulations shall issue prescribing the kind of stamp to be used and the manner of affixing and canceling the same.

§ 1422. Title III, § 17. Release of Property Seized.

When any property is seized for violation of this title it may be released to the claimant or to any intervening party, in the discretion of the commissioner, on a bond given and approved.

§ 1423. Title III, § 18. Provisions of Internal Revenue Laws Made Applicable.

All administrative provisions of internal-revenue law, including those relating to assessment, collection, abatement, and refund of taxes and penalties, and the seizure and forfeiture of property, are made applicable to this title in so far as they are not inconsistent with the provisions thereof.

§ 1424. Title III, § 19. Repeal of Laws Relating to Alcohol.

All prior statutes relating to alcohol as defined in this title are hereby repealed in so far as they are inconsistent with the provisions of this title.

§ 1425. Title III, § 20. Intoxicating Liquors in Canal Zone.

It shall be unlawful to import or introduce into the Canal Zone, or to manufacture, sell, give away, dispose of, transport, or have in one's possession or under one's control within the Canal Zone, any alcoholic, fermented, brewed, distilled, vinous, malt, or spirituous liquors, except for sacramental, scientific, pharmaceutical, industrial, or medicinal purposes, under regulations to be made by the President, and any such liquors within the Canal Zone in violation hereof shall be forfeited to the United States and seized: Provided, That this section shall not apply to liquor in transit through the Panama Canal or on the Panama Railroad.

That each and every violation of any of the provisions of this section shall be punished by a fine of not more than \$1000 or imprisonment not exceeding six months for a first offense, and by a fine not less than \$200 nor more than \$2000 and imprisonment not less than one month nor more than five years for a second or subsequent offense.

That all offenses heretofore committed within the Canal Zone may be prosecuted and all penalties therefor enforced in the same manner and to the same extent as if this Act has not been passed.

§ 1426. Title III, § 21. Time of Taking Effect of Act.

Titles I and III and sections 1, 27, 37, and 38 of title II of this Act shall take effect and be in force from and after the passage and approval of the Act. The other sections of title II shall take effect and be in force from and after the date when the eighteenth amendment of the Constitution of the United States goes into effect.

On June 2, 1920, the Supreme Court of the United States rendered a decision sustaining the constitutionality of the Eighteenth Amendment to the Constitution of the United States and upholding the validity of the Volstead Act in all respects. The opinion was rendered by Mr. Justice Van Devanter and only the ultimate conclusion of the Court was announced. There were several cases before the Supreme Court. The constitutionality of the Eighteenth Amendment and of the Volstead Act was questioned by the State of Rhode Island and by private interests, but the

Court ruled against each and every contention advanced against the validity of said Amendment and of the Volstead Act. The ruling of the Supreme Court definitely sets at rest the question of the validity of said enactments. All other questions relating to the administration and enforcement of said Act will have to be construed in harmony with the rules of construction pertaining generally to criminal statutes, and in accord with the well-established constitutional safeguards and requirements provided for the protection of persons accused of crime in the Courts of the United States. The chapter in this work entitled "Searches and Seizures" (Vol. I, Chapter XIII) should be specially consulted as an aid to the construction and application of this Act. A few of the recent decisions will be noted. It was held that the Volstead Act impliedly repealed all earlier statutes relating to intoxicating liquors, but that this Act does not apply to industrial alcohol.¹ The United States Circuit Court of Appeals for the Eighth Circuit recently held that the finding of large quantities of liquor in the defendant's residence was not *per se* evidence that such liquor was unlawfully transported and that no conviction may be had under this Act upon the uncorroborated extra-judicial admissions of the defendant.² The right to due process of law was not taken away by the Eighteenth Amendment. It was accordingly held that a prohibition officer may not seize liquor without a search warrant, except in cases where liquor is found to be in the course of transportation contrary to law, and that an officer making a seizure must institute proceedings to determine the property rights to such liquor.³ An indictment charging the defendant with purchasing liquors with the object of having same transported in interstate commerce was held to be sufficient.⁴ In reversing a conviction in a recent case, Chief Justice Smyth of the Court of Appeals of the District of Columbia made the following remark: "Even in liquor cases verdicts cannot be upheld unless there is some competent evidence to support

§ 1426. ¹ *United States v. Windham*, 264 Fed. 376.

² *Martin v. United States*, 264 Fed. 950, (C. C. A. 8th Cir.), but compare, *Rivalto v. United States*, 259 Fed. 208 (C. C. A. 6th Cir.),

and *Berryman v. United States*, 259 Fed. 208, 210 (C. C. A. 6th Cir.).

³ *United States v. Crossen*, 264 Fed. 459.

⁴ *United States v. Collins*, 264 Fed. 380.

them.⁵ It is incumbent on the Government to prove venue in a prosecution under this Act.⁶ The prosecution must prove a guilty knowledge on the part of the accused.⁷ The Court cannot ignore the element of knowledge and must instruct the jury on this point when requested.⁸

⁵ *Whiting v. United States*, 263 Fed. 477.

⁶ *Moran v. United States*, 264 Fed. 768 (C. C. A. 6th Cir.).

⁷ *Ousler v. United States*, 263 Fed. 968 (C. C. A. 6th Cir.).

⁸ *Bishop v. United States*, 259 Fed. 197 (C. C. A. 6th Cir.); *United States v. Collins*, 254 Fed. 869.

CHAPTER LXXXVII

MISCELLANEOUS ACTS

- § 1427. National Motor Vehicle Theft Act.
- § 1428. An Act to Prohibit the Purchase, Sale, or Possession for the Purpose of Sale of Certain Wild Birds in the District of Columbia.
- § 1429. Synopsis of Filled Cheese Act.
- § 1430. Synopsis of Mixed Flour Act.
- § 1431. Synopsis of an Act Relating to the Manufacture and Sale of White Phosphorus Matches.
- § 1432. An Act to Regulate Further the Entry of Aliens into the United States.
- § 1433. An Act to Punish the Willful Injury or Destruction of War Material, or of War Premises or Utilities Used in Connection with War Material, and for Other Purposes.
- § 1434. An Act to Prevent Interference with the Use of Homing Pigeons by the United States, to Provide a Penalty for Such Interference, and for Other Purposes.

NATIONAL MOTOR VEHICLE THEFT ACT

§ 1427. An Act to Punish the Transportation of Stolen Motor Vehicles in Interstate or Foreign Commerce.¹

SEC. 1. That this Act may be cited as the National Motor Vehicle Theft Act.

SEC. 2. That when used in this Act:

(a) The term "motor vehicle" shall include an automobile, automobile truck, automobile wagon, motor cycle, or any other self-propelled vehicle not designed for running on rails;

(b) The term "interstate or foreign commerce" as used in this Act shall include transportation from one State, Territory, or the District of Columbia, to another State, Territory, or the District of Columbia, to a foreign country, or from a foreign country to any State, Territory, or the District of Columbia.

§ 1427. ¹ Act of October 29, 1919.

SEC. 3. That whoever shall transport or cause to be transported in interstate or foreign commerce a motor vehicle, knowing the same to have been stolen, shall be punished by a fine of not more than \$5000, or by imprisonment of not more than five years, or both.

SEC. 4. That whoever shall receive, conceal, store, barter, sell, or dispose of any motor vehicle, moving as, or which is a part of, or which constitutes interstate or foreign commerce, knowing the same to have been stolen, shall be punished by a fine of not more than \$5000, or by imprisonment of not more than five years, or both.

SEC. 5. That any person violating this Act may be punished in any district in or through which such motor vehicle has been transported or removed by such offender.

Received by the President, October 17, 1919.

[NOTE BY THE DEPARTMENT OF STATE. — The foregoing act having been presented to the President of the United States for his approval, and not having been returned by him to the house of Congress in which it originated within the time prescribed by the Constitution of the United States, has become a law without his approval.]

GAME ANIMALS AND BIRDS

§ 1428. **An Act to Prohibit the Purchase, Sale, or Possession for the Purpose of Sale of Certain Wild Birds in the District of Columbia.**¹

SEC. 1. That it shall be unlawful, within the District of Columbia, for any person at any time to buy, sell, or expose for sale, or to have in possession for the purpose of selling, any heath hen, sage hen, any kind of quail, bob white, grouse, partridge, ptarmigan, prairie chicken, pheasant, wild turkey, Hungarian partridge, English, ring-necked, Mongolian or Chinese pheasant, or marsh blackbird.

SEC. 2. That nothing herein contained shall prevent the right of any person to take or kill any game birds herein defined when the same shall be so taken or killed by virtue of the authority of a license duly issued by the proper authorities of said District of Columbia for scientific purposes.

§ 1428. ¹ Act of Dec. 18, 1919.

That any person who shall violate any of the provisions of this Act shall be fined not more than \$100, or be imprisoned for not more than one month, or both so fined and imprisoned: *Provided*, That each bird mentioned in this Act so had in possession, bought, sold, exposed for sale, or had in possession for the purpose of sale shall constitute a separate offense.

SEC. 3. That nothing in this Act shall prevent the sale at any time of Hungarian partridges, English, ring-necked, Mongolian or Chinese pheasants, when the same shall have been raised in captivity, or the sale of birds mentioned in this Act alive, for propagating purposes, under such regulations and requirements as shall be prescribed by the Commissioners of the District of Columbia.

SEC. 4. That all Acts or parts of Acts in conflict herewith are hereby repealed.

§ 1429. Synopsis of Filled Cheese Act.¹

Manufacturers of filled cheese must comply with the regulations of the Commissioner of Internal Revenue made with the approval of the Secretary of the Treasury and file a sufficient bond in not less than \$5,000. Failure to do so is a misdemeanor and punishable by fine of not less than \$500 nor more than \$1,000. (Sec. 5.) The filled cheese must be packed in wooden packages only and marked, stamped and branded as required by the act. Retail dealers must sell only from the original stamped packages. Violation is punishable by fine of not less than \$50 or more than \$500 or imprisonment for not less than 30 days nor more than one year. (Sec. 6.) Retail and wholesale dealers must display in a conspicuous place in their salerooms a sign bearing the words "Filled cheese sold here." Violation of the Act is a misdemeanor punishable by fine of \$50 to \$200. (Sec. 7.) Manufacturers must paste on each package a notice that the law has been complied with, and a caution against using the package or stamp again. Fifty dollars is the fine for each offense. (Sec. 8.) A tax of one cent a pound is payable on the manufacture of filled cheese by the manufacturer. Imported filled cheese pays an additional tax of eight cents per pound. (Secs. 9-11.) Fifty dollars penalty is imposed

§ 1429. ¹ Act of June 6, 1896, c. 337, 29 Stat. L. 253.

for purchasing for sale filled cheese not properly stamped (Sec. 12). One hundred dollars and forfeiture is the penalty for knowingly purchasing from the manufacturer for sale filled cheese on which the special tax has not been paid (Sec. 13). Fine of \$50 or imprisonment of from 10 days to 6 months is the punishment for neglect to destroy stamps (Sec. 14). Untaxed and deleterious filled cheese is forfeited to the government (Sec. 16). The statute was held to be constitutional.²

MIXED FLOUR ACT

§ 1430. Synopsis of Mixed Flour Act.¹

Every person, firm or corporation making, packing, or repacking mixed flour must mark or brand the packages "mixed flour" as required by the act, and place in the package a card showing the contents, name of maker or packer and place where made or packed. Failure to comply is punishable by fine of \$250 to \$500, or imprisonment for from 60 days to one year. Sales of mixed flour in unbranded packages or falsely branded is punishable by a like fine or imprisonment of 30 days to one year. Notice of compliance with the law and caution against violating it must be affixed to each package under penalty of \$50. The amount of tax payable, size of barrel, stamps, branding and labeling packages is prescribed by the act. Violation is punishable by fine of from \$250 to \$500 or imprisonment for not more than one year. The penalty for purchasing or receiving unbranded imported flour is \$5 to \$500, for knowingly purchasing or receiving unstamped flour on which the tax has not been paid is not less than \$50 with forfeiture of the flour. Stamps must be destroyed on disposing of packages of mixed flour under penalty of \$25. Second offenses under the act are punishable by additional penalties of imprisonment of not less than 30 days or more than 90 days.

WHITE PHOSPHORUS MATCHES ACT

§ 1431. Synopsis of White Phosphorus Matches Act.

The Act of April 9, 1912, Ch. 75, 37 Stat. L. 81 (Comp. St. §§ 6271-6287) provides that every manufacturer of white phos-

² *Cornell v. Coyne*, 192 U. S. 418,
48 L. Ed. 504, 24 S. C. 383.

§ 1430. ¹ 30 Stat. L. 467, 468, 469,
470. (Comp. St. 6258-6270.)

phorus matches shall register with the collector of internal revenue of the district his name or style, place of manufactory, and the place where his business is to be carried on; failure to register subjects to a penalty of not more than \$500. He must file such notices, inventories and bonds and affix such signs and numbers to his factory as are required by regulation of the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury (Sec. 2). The bond must be for not less than \$1,000. Matches must be packed in packages containing 100, 200, 500, 1,000 or 1,500 matches each, which must then be packed in packages containing not less than 14,400 matches, upon which a tax of two cents per one hundred matches is paid, represented by adhesive stamps. Fraudulently using or failing to cancel such stamps is punishable by a fine of \$50 for every stamp in respect of which the offense is committed (Sec. 3). Evasion of the tax by a manufacturer by failure to affix canceled stamps, or by concealment of matches is punishable by fine of not more than \$1,000 and imprisonment for not more than two years, with forfeiture of the matches (Sec. 4). The punishment for the use of insufficient stamps is a fine of not more than \$1,000 or imprisonment of not more than two years, or both (Sec. 5). The penalty for removal, defacement or re-using of stamps is a fine of \$50 per package, and forfeiture of the matches (Sec. 6). Attempt by a manufacturer to defraud, or defraud of, the government of the tax imposed by the act, or any part thereof, is punishable by forfeiture of the factory and manufacturing apparatus and all matches and raw material therein, and fine of not more than \$5,000 or imprisonment of not more than three years, or both. Matches found unstamped are forfeited (Sec. 7). Counterfeiting laws apply to the special stamps issued (Sec. 8). Manufacturers must mark, brand, affix, stamp, or print on every package of matches sold or removed by him the factory number. Omission to do so is punishable by a fine of not more than \$50 per package. He must paste on each package a notice that the law has been complied with and a caution not to use the stamps again. Omission to do so, and removal of a label so affixed is punishable by fine of not more than \$50 per package. Where there is no specific penalty provided for anything prohibited by the act, the fine is \$1,000 for each offense,

with forfeiture of all matches owned by the manufacturer, importer, or exporter guilty thereof (Sec. 13).

IMMIGRATION

§ 1432. **An Act to Regulate Further the Entry of Aliens into the United States.**¹

SEC. 1. . . . That if the President shall find that the public safety requires that restrictions and prohibitions in addition to those provided otherwise than by this Act be imposed upon the entry of aliens into the United States, and shall make public proclamation thereof, it shall, until otherwise ordered by the President or Congress, be unlawful —

(a) For any alien to enter or attempt to enter the United States except under such reasonable rules, regulations, and orders, and subject to such passport, visé, or other limitations and exceptions as the President shall prescribe;

(b) For any person to transport or attempt to transport into the United States another person with knowledge or reasonable cause to believe that the entry of such other person is forbidden by this Act;

(c) For any person knowingly to make any false statement in an application for a passport or other permission to enter the United States with intent to induce or secure the granting of such permission, either for himself or for another;

(d) For any person knowingly to furnish or attempt to furnish or assist in furnishing to another a viséed passport or other permit or evidence of permission to enter, not issued and designed for such other person's use:

(e) For any person knowingly to use or attempt to use any viséed passport or other permit or evidence of permission to enter not issued and designated for his use;

(f) For any person to forge, counterfeit, mutilate, or alter, or cause or procure to be forged, counterfeited, mutilated, or altered, any passport, visé or other permit or evidence of permission to enter the United States;

(g) For any person knowingly to use or attempt to use or furnish to another for use any false, forged, counterfeited,

§ 1432. ¹ Act of Nov. 10, 1919.

mutilated, or altered passport, permit, or evidence of permission, or any passport, permit, or evidence of permission which, though originally valid, has become or been made void or invalid.

SEC. 2. That any person who shall willfully violate any of the provisions of this Act, or of any order or proclamation of the President promulgated, or of any permit, rule, or regulation issued thereunder, shall, upon conviction, be fined not more than \$5000, or, if a natural person, imprisoned for not more than five years, or both; and the officer, director, or agent of any corporation who knowingly participates in such violation shall be punished by like fine or imprisonment, or both; and any vehicle or any vessel, together with its or her appurtenances, equipment, tackle, apparel, and furniture, concerned in any such violation, shall be forfeited to the United States.

SEC. 3. That the term "United States" as used in this Act includes the Canal Zone and all territory and waters, continental or insular, subject to the jurisdiction of the United States.

The word "person" as used herein shall be deemed to mean any individual, partnership, association, company, or other incorporated body of individuals, or corporation, or body politic.

SEC. 4. That in order to carry out the purposes and provisions of this Act the sum of \$600,000 is hereby appropriated.

SEC. 5. That this Act shall take effect upon the date when the provisions of the Act of Congress approved the 22d day of May, 1918, entitled "An Act to prevent in time of war departure from and entry into the United States, contrary to the public safety", shall cease to be operative, and shall continue in force and effect until and including the 4th day of March, 1921.

Received by the President, October 29, 1919.

[NOTE BY THE DEPARTMENT OF STATE. — The foregoing Act having been presented to the President of the United States for his approval, and not having been returned by him to the house of Congress in which it originated within the time prescribed by the Constitution of the United States, has become a law without his approval.]

WAR MATERIAL

§ 1433. **An Act to Punish the Willful Injury or Destruction of War Material, or Utilities Used in Connection with War Material, and for Other Purposes.**

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the words "war material", as used herein, shall include arms, armament, ammunition, livestock, stores of clothing, food, foodstuffs, or fuel; and shall also include supplies, munitions, and all other articles of whatever description, and any part or ingredient thereof, intended for, adapted to, or suitable for the use of the United States, or any associate nation, in connection with the conduct of the war.

The words "war premises", as used herein, shall include all buildings, grounds, mines, or other places wherein such war material is being produced, manufactured, repaired, stored, mined, extracted, distributed, loaded, unloaded, or transported, together with all machinery and appliances therein contained; and all forts, arsenals, navy yards, camps, prisons, or other military or naval stations of the United States, or any associate nation.

The words "war utilities", as used herein, shall include all railroads, railways, electric lines, roads of whatever description, railroad or railway fixture, canal, lock, dam, wharf, pier, dock, bridge, building, structure, engine, machine, mechanical contrivance, car, vehicle, boat, or aircraft, or any other means of transportation whatsoever, whereon or whereby such war material or any troops of the United States, or of any associate nation, are being or may be transported either within the limits of the United States or upon the high seas; and all dams, reservoirs, aqueducts, water and gas mains and pipes, structures and buildings, whereby or in connection with which water or gas is being furnished, or may be furnished, to any war premises or to the military or naval forces of the United States, or any associate nation, and all electric light and power, steam or pneumatic power, telephone and telegraph plants, poles, wires, and fixtures and wireless stations, and the buildings connected with the maintenance and operation thereof used to supply water, light, heat, power, or facilities of

communication to any war premises or to the military or naval forces of the United States, or any associate nation.

The words "United States" shall include the Canal Zone and all territory and waters, continental and insular, subject to the jurisdiction of the United States.

The words "associate nation", as used in this Act, shall be deemed to mean any nation at war with any nation with which the United States is at war.

SEC. 2. That when the United States is at war, whoever, with intent to injure, interfere with, or obstruct the United States or any associate nation in preparing for or carrying on the war, or whoever, with reason to believe that his act may injure, interfere with, or obstruct the United States or any associate nation in preparing for or carrying on the war, shall willfully injure or destroy, or shall attempt to so injure or destroy, any war material, war premises, or war utilities, as herein defined, shall, upon conviction thereof, be fined not more than \$10,000 or imprisoned not more than thirty years, or both.

SEC. 3. That when the United States is at war, whoever, with intent to injure, interfere with, or obstruct the United States or any associate nation in preparing for or carrying on the war, or whoever, with reason to believe that his act may injure, interfere with, or obstruct the United States or any associate nation in preparing for or carrying on the war, shall willfully make or cause to be made in a defective manner, or attempt to make or cause to be made in a defective manner, any war material, as herein defined, or any tool, implement, machine, utensil, or receptacle used or employed in making, producing, manufacturing, or repairing any such war material, as herein defined, shall, upon conviction thereof, be fined not more than \$10,000 or imprisoned not more than thirty years, or both.¹

HOMING PIGEONS

§ 1434. An Act to Prevent Interference with the Use of Homing Pigeons by the United States, to Provide a Penalty for Such Interference, and for Other Purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

§ 1433. ¹ Approved, April 20, 1918.

That it be, and it hereby is, declared to be unlawful to knowingly entrap, capture, shoot, kill, possess, or in any way detain an Antwerp, or homing pigeon, commonly called carrier pigeon, which is owned by the United States or bears a band owned and issued by the United States having thereon the letters "U. S. A." or "U. S. N." and a serial number.

SEC. 2. That the possession or detention of any pigeon described in section one of this Act by any person or persons in any loft, house, cage, building, or structure in the ownership or under the control of such person or persons without giving immediate notice by registered mail to the nearest military or naval authorities, shall be prima facie evidence of a violation of this Act.

SEC. 3. That any person violating the provisions of this Act shall, upon conviction, be punished by a fine of not more than \$100, or by imprisonment for not more than six months, or by both such fine and imprisonment.¹

§ 1434. ¹ Approved, April 19, 1919.

CHAPTER LXXXVIII

OLEOMARGARINE

- § 1435. Butter Defined.
- § 1436. Oleomargarine — Definition.
- § 1437. Special Taxes on Manufacturers and Dealers.
- § 1438. Failure of Manufacturer to Pay Special Tax.
- § 1439. Manufacturer's Statement of Business Inventories, Bonds, Books, Returns.
- § 1440. Packing — Retailing.
- § 1441. Label and Notice on Packages.
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- § 1455. Butter, Adulterated Butter, and Process or Renovated Butter — Definition.
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- § 1457. Adulterated Butter — Packing and Sale.
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- § 1459. Tax on Adulterated or Renovated Butter — Stamps.
- § 1460. Law as to Oleomargarine Applicable to Adulterated Butter.
- § 1461. Sanitary Regulation of Renovated Butter Factories.
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§ 1435. Butter Defined.

For the purposes of this act the word "butter" shall be understood to mean the food product usually known as

butter, and which is made exclusively from milk or cream, or both, with or without common salt, and with or without additional coloring matter.¹

The Act of August 2, 1886, is a revenue law of the same class as those embodied in Title XXXV of the Revised Statutes. It imposes a specific tax on oleomargarine and "special taxes" on those who engage in its manufacture or sale, and contains several administrative and penal provisions. But it does not purport to be independent of other legislation or complete in itself. On the contrary, it plainly contemplates the existence of an established system of revenue laws to which resort shall be had in carrying it into effect.² In a prosecution for violating the oleomargarine laws punishment may be inflicted upon each count of the indictment, if each count states a separate specific offense,³ based upon separate and independent transactions.

§ 1436. Oleomargarine — Definition.

For the purposes of this act certain manufactured substances, certain extracts, and certain mixtures and compounds, including such mixtures and compounds with butter, shall be known and designated as "oleomargarine", namely: All substances heretofore known as oleomargarine, oleo, oleomargarine-oil, butterine, lardine, suine, and neutral; all mixtures and compounds of oleomargarine, oleo, oleomargarine-oil, butterine, lardine, suine, and neutral; all lard extracts and tallow extracts; and all mixtures and compounds of tallow, beef-fat, suet, lard, lard-oil, vegetable-oil, annatto, and other coloring matter, intestinal fat, and offal fat made in imitation or semblance of butter, or when so made, calculated or intended to be sold as butter or for butter.¹

The tax practically is upon the product of such manufactures of leaf lard, beef fat, etc., as are made in the conscious imitation of butter. A food product composed of beef lard and beef fat bathed in salt ice water to take away the fat and lard odor, but

§ 1435. ¹ Act of August 2, 1886, c. 840, § 1, 24 Stat. L. 209.

² *United States v. Barnes*, 222 U. S. 513, 518, 56 L. ed. 291, 32 S. C. 117.

³ *Kreuzer v. United States*, 254 Fed. 34, C. C. A. (8th Cir.).

§ 1436. ¹ Act of August 2, 1886, c. 840, § 2, 24 Stat. L. 209.

containing no mixture of cream, milk, or butter to give it a butter flavor, and no coloring matter to give it a butter appearance, is not taxable under the act.² It was held that the oleomargarine acts are complete in themselves, and that only the provisions therein contained, or those sections of the internal revenue laws incorporated therein for the enforcement of the tax, are applicable.³ It was held in two cases that a retail grocer who for the accommodation of his customers passes on their orders to manufacturers, executing the orders, but without profit to himself, is not subject to the tax as a wholesale dealer.⁴ But, it was likewise held that the words "any person" embrace any and all persons, whether licensed wholesale or retail dealers or otherwise.⁵ The term "manufacturer" as used in this section means one engaged in the business of selling, vending, or furnishing oleomargarine for the consumption of others; and proof of actual selling, vending, or furnishing of some of the product is not necessary to constitute the offense.⁶ For the purposes of this act a distinction is drawn between a barter and sale. Thus, it was held that the borrowing by a retail dealer in oleomargarine of a package from another retail dealer, which he returned a few days after, from a wholesale shipment he had purchased, constituted a barter, and not a sale, and did not subject the borrower to the tax on wholesale dealers.⁷ A firm is a wholesale dealer, within the purview of the act, if it purchases the oleomargarine desired for its own business and that of another firm containing its members and one additional member, has it charged, billed, and delivered to it at its place of business, and pays therefor with its check, and then sends and charges to the other firm, at the same price, the amount desired by it and is paid therefor by the other firm's check; the oleomargarine during all these transactions being in the original packages.⁸ A retail dealer in oleo-

² *Braun & Fitts v. Coyne*, 125 Fed. 331.

³ *Craft v. Schafer*, 153 Fed. 175, 82 C. C. A. 349 (6th Cir.); *Grier v. Tucker*, 150 Fed. 658, *affirmed* 160 Fed. 611, 87 C. C. A. 513 (8th Cir.).

⁴ *Grier v. Tucker*, *supra*; *Hartzell v. United States*, 83 Fed. 1002.

⁵ *Vermont v. United States*, 174 Fed. 792, 98 C. C. A. 500 (8th Cir.).

⁶ *Vermont v. United States*, *ibid.*

⁷ *Ewers v. Weaver*, 182 Fed. 713, *affirmed* *Weaver v. Ewers*, 195 Fed. 247, 115 C. C. A. 219 (8th Cir.).

⁸ *Mitchell v. Cole*, 226 Fed. 824.

margarine is liable to the tax, though he honestly believed that what he bought and sold was butter.⁹

§ 1437. Special Taxes on Manufacturers and Dealers.

Special taxes are imposed as follows: Manufacturers of oleomargarine shall pay six hundred dollars. Every person who manufactures oleomargarine for sale shall be deemed a manufacturer of oleomargarine. And any person that sells, vends, or furnishes oleomargarine for the use and consumption of others, except to his own family table without compensation, who shall add to or mix with such oleomargarine any artificial coloration that causes it to look like butter of any shade of yellow shall also be held to be a manufacturer of oleomargarine within the meaning of said Act, and subject to the provisions thereof. Wholesale dealers in oleomargarine shall pay four hundred and eighty dollars. Every person who sells or offers for sale oleomargarine in the original manufacturer's packages shall be deemed a wholesale dealer in oleomargarine. But any manufacturer of oleomargarine who has given the required bond and paid the required special tax, and who sells only oleomargarine of his own production, at the place of manufacture, in the original packages to which the tax-paid stamps are affixed, shall not be required to pay the special tax of a wholesale dealer in oleomargarine on account of such sales. Retail dealers in oleomargarine shall pay forty-eight dollars. Every person who sells oleomargarine in less quantities than ten pounds at one time shall be regarded as a retail dealer in oleomargarine. And sections thirty-two hundred and thirty-two, thirty-two hundred and thirty-three, thirty-two hundred and thirty-four, thirty-two hundred and thirty-five, thirty-two hundred and thirty-six, thirty-two hundred and thirty-seven, thirty-two hundred and thirty-eight, thirty-two hundred and thirty-nine, thirty-two hundred and forty, thirty-two hundred and forty-one, and thirty-two hundred and forty-three of the Revised Statutes of the United States, are, so far as applicable, made to extend to and include and apply to the special taxes imposed by this section, and to the persons upon whom they are imposed:

⁹ *Eagle v. Nowlin*, 94 Fed. 646.

Provided, That in case any manufacturer of oleomargarine commences business subsequent to the thirtieth day of June in any year, the special tax shall be reckoned from the first day of July in that year, and shall be five hundred dollars. *Provided further*, That wholesale dealers who vend no other oleomargarine or butterine except that upon which a tax of one-fourth of one per cent per pound is imposed by this Act, as amended, shall pay two hundred dollars; and such retail dealers as vend no other oleomargarine or butterine except that upon which is imposed by this Act, as amended, a tax of one fourth of one cent per pound shall pay six dollars.¹

An indictment charging generally in the language of the statute that the defendant carried on the business of a manufacturer of oleomargarine without having paid the special tax required by section 3 is sufficient without a statement of the facts constituting him a manufacturer.²

§ 1438. Failure of Manufacturer to Pay Special Tax.

Every person who carries on the business of a manufacturer of oleomargarine without having paid the special tax therefor, as required by law, shall, besides being liable to the payment of the tax, be fined not less than one thousand and not more than five thousand dollars; and every person who carries on the business of a wholesale dealer in oleomargarine without having paid the special tax therefor, as required by law, shall, besides being liable to the payment of the tax, be fined not less than five hundred nor more than two thousand dollars; and every person who carries on the business of a retail dealer in oleomargarine without having paid the special tax therefor, as required by law, shall, besides being liable to the payment of the tax, be fined not less than fifty nor more than five hundred dollars for each and every offense.¹

§ 1437. ¹ Act of August 2, 1886, c. 840, § 3, 24 Stat. L. 209, amended, May 9, 1902, c. 784, § 2, 32 Stat. L. 194.

² Hart v. United States, 183 Fed.

368, — C. C. A. — (6th Cir.); Hartman v. United States, 168 Fed. 30, 94 C. C. A. 124 (6th Cir.).

§ 1438. ¹ Act of August 2, 1886, c.

840, § 4, 24 Stat. L. 209.

It was held that, although a violation of the section is not in terms made a misdemeanor, such violations are in the nature of criminal offenses, and may be prosecuted by information or indictment,² but this statement of the law must be held to be modified by the New Criminal Code defining felonies and misdemeanors under such code.³ An indictment need not set out the facts constituting the defendant a manufacturer.⁴ It was held by a district judge that an indictment in the words of the act is not objectionable for indefiniteness nor for failure to negative that the defendant was a manufacturer selling his own product in stamped packages at the place of manufacture, within the exception of the statute.⁵

§ 1439. Manufacturer's Statement of Business, Inventories, Bonds, Books, Returns.

Every manufacturer of oleomargarine shall file with the collector of internal revenue of the district in which his manufactory is located such notices, inventories, and bonds, shall keep such books and render such returns of materials and products, shall put up such signs and affix such number of his factory, and conduct his business under such surveillance of officers and agents as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may, by regulation, require. But the bond required of such manufacturer shall be with sureties satisfactory to the collector of internal revenue, and in a penal sum of not less than five thousand dollars; and the sum of said bond may be increased from time to time and additional sureties required at the discretion of the collector, or under instructions of the Commissioner of Internal Revenue.¹

An internal revenue collector has no authority, under Rev. St. section 3173, to require a wholesale dealer to produce his books for inspection and examination.²

² United States v. Joyce, 138 Fed. 455.

³ See § 996, *supra*.

⁴ Hart v. United States, 183 Fed. 368, 105 C. C. A. 588 (6th Cir.).

⁵ United States v. Joyce, *supra*, but see INDICTMENTS, generally.

§ 1439. ¹ Act of August 2, 1886, c. 840, § 5, 24 Stat. L. 210.

² In re Kearns, 64 Fed. 481; In re Kinney, 102 Fed. 468.

§ 1440. **Packing — Retailing.**

All oleomargarine shall be packed by the manufacturer thereof in firkins, tubs, or other wooden or paper packages not before used for that purpose, each containing not less than ten pounds, and marked, stamped, and branded as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe; and all sales made by manufacturers of oleomargarine, and wholesale dealers in oleomargarine shall be in original stamped packages. Retail dealers in oleomargarine must sell only from original stamped packages, in quantities not exceeding ten pounds, and shall pack the oleomargarine sold by them in suitable wooden or paper packages, which shall be marked and branded as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe. Every person who knowingly sells or offers for sale, or delivers or offers to deliver, any oleomargarine in any other form than in new wooden or paper packages as above described, or who packs in any package any oleomargarine in any manner contrary to law, or who falsely brands any package or affixes a stamp on any package denoting a less amount of tax than that required by law, shall be fined for each offense not more than one thousand dollars, and be imprisoned not more than two years.¹

This section has been held constitutional.² The penal clause of this section in denouncing the sale of oleomargarine otherwise than in “new wooden or paper packages” refers to sales by retail dealers as well as by others.³ The fact that an indictment charged more in each count than was required to constitute a single offense was no objection thereto.⁴ The penalty prescribed in this section does not apply to that part of the section prohibiting

§ 1440. ¹ Act of August 2, 1886, c. 840, § 6, 24 Stat. L. 210, as amended by Act Oct. 1, 1918, by the addition of the words “or paper” in the second line of the section.

² *Dougherty v. United States*, 108 Fed. 56, 47 C. C. A. 195 (3d Cir.); *Rippir v. United States*, 178

Fed. 24, 101 C. C. A. 152 (8th Cir.); *In re Kollock*, 165 U. S. 526, 41 L. ed. 813, 17 S. C. 444.

³ *Dougherty v. United States*, *supra*.

⁴ *Dougherty v. United States*, *supra*; *Goll v. United States*, 166 Fed. 419, 92 C. C. A. 171 (7th Cir.).

retailers from selling in quantities exceeding ten pounds, such offense being subject to punishment by a fine of \$1000 without imprisonment, as prescribed by section 18.⁵ The required approval of the Secretary of the Treasury is merely as to the kind of marks to be used, and does not prevent an indictment being had for neglect to conform to the requirement to sell oleomargarine only from the original stamped package, and to pack it in suitable packages, properly marked and branded.⁶ In indictments for failure to properly mark the package, the regulation covering marks and brands should be pleaded in substance.⁷ An indictment charging a retailer with a violation of the section must describe the package with reasonable certainty so as to advise the defendant of the particular offense charged.⁸ It is not enough that the indictment follows the words of the act if it is not sufficiently specific. An indictment which does not allege whether the sales were at wholesale or retail, and in what respect the packages were not in the form prescribed, and what stamps, marks, or brands required by law they did not have thereon, is insufficient. And an indictment alleging that the defendants willfully, etc., defaced the stamps, marks and brands upon two certain packages in their possession containing oleomargarine, but which fails to show that the stamps removed were such as are prescribed by the statute, is insufficient.⁹ The words "every person" refer solely to manufacturers and dealers previously mentioned in the section, and an indictment which fails to charge that the accused was either a manufacturer or dealer in oleomargarine, and as such violated the act, states no offense.¹⁰ To convict of a wrongful sale of oleomargarine made by another it must be shown that the defendant ordered, advised, approved or had knowledge of the sale.¹¹

§ 1441. Label and Notice on Packages.

Every manufacturer of oleomargarine shall securely affix, by pasting, on each package containing oleomargarine

⁵ *Ripper v. United States, supra.*

⁹ *United States v. Joyce*, 138

⁶ *United States v. Ford*, 50 Fed.

Fed. 457.

467.

¹⁰ *Morris v. United States*, 168

⁷ *United States v. Ford, ibid.*

Fed. 682, 94 C. C. A. 168 (8th Cir.).

⁸ *United States v. Lockwood*, 164

¹¹ *Goll v. United States, supra.*

Fed. 772.

manufactured by him, a label on which shall be printed, besides the number of the manufactory and the district and State in which it is situated, these words: "Notice — The manufacturer of the oleomargarine herein contained has complied with all the requirements of law. Every person is cautioned not to use either this package again or the stamp thereon again, nor to remove the contents of this package without destroying said stamp, under the penalty provided by law in such cases." Every manufacturer of oleomargarine who neglects to affix such label to any package containing oleomargarine made by him, or sold or offered for sale by or for him, and every person who removes any such label so affixed from any such package, shall be fined fifty dollars for each package in respect to which such offense is committed.¹

§ 1442. Tax.

Upon oleomargarine which shall be manufactured and sold, or removed for consumption or use, there shall be assessed and collected a tax of ten cents per pound, to be paid by the manufacturer thereof; and any fractional part of a pound in a package shall be taxed as a pound; *Provided*, When oleomargarine is free from artificial coloration that causes it to look like butter of any shade of yellow said tax shall be one-fourth of one per cent per pound. The tax levied by this section shall be represented by coupon stamps; and the provisions of existing laws governing the engraving, issue, sale, accountability, effacement and destruction of stamps relating to tobacco and snuff, as far as applicable, are hereby made to apply to stamps provided for by this section.¹

The indictment need not indicate whether the defendants manufactured by adding coloring matter to oleomargarine made by others, or added it to oleomargarine made entirely by themselves.² The use of a small percentage of palm oil in the manufacture of oleomargarine to color the substance to represent the color of butter, though the oil itself is free from artificial coloration, does

§ 1441. ¹ Act of August 2, 1886, May 9, 1902, c. 784, § 3, 32 Stat. L. c. 840, § 7, 24 Stat. L. 210. 194.

§ 1442. ¹ Act of August 2, 1886, ² United States v. Orr, 233 Fed. c. 840, § 8, 24 Stat. L. 210, amended 718.

not render the product subject to the lower rate of taxation, notwithstanding treasury regulations permitting such use.³ The section levies an excise tax and is not unconstitutional as outside of the powers of Congress, or as interfering with the powers reserved to the States, or amounting to a destruction of the business of manufacturing oleomargarine, or discriminating against oleomargarine and in favor of butter.⁴ "Removal", sufficient to establish guilt under section 8 of the Act of 1886, as amended by Act of May 9, 1902, section 3, imposing a special tax on oleomargarine manufactured and sold or removed for consumption or use, is not determined by distance, nor by the building from which or to which the oleomargarine is taken. It may consist in the removal of the colored product from a "cave" in a building to a salesroom above, for the purpose of selling it without paying the stamp tax.⁵ Where a manufacturer of oleomargarine uses as an ingredient butter artificially colored the product is subject to the tax of 10 cents per pound.⁶

§ 1443. Assessment of Tax When Sold without Stamps.

Whenever any manufacturer of oleomargarine sells, or removes for sale or consumption any oleomargarine upon which the tax is required to be paid by stamps, without the use of the proper stamps, it shall be the duty of the Commissioner of Internal Revenue, within a period of not more than two years after such sale or removal, upon satisfactory proof, to estimate the amount of tax which has been omitted to be paid, and to make an assessment therefor and certify the same to the collector. The tax so assessed shall be in addition to the penalties imposed by law for such sale or removal.¹

The provisions of sections 9-21 of this act were made applicable to the manufacturers of adulterated butter by the Act of May 9, 1902, c. 784, § 4.²

³ *Moxley v. Hertz*, 216 U. S. 344, 54 L. ed. 510, 30 S. C. 305; *Cliff v. United States*, 195 U. S. 159, 49 L. ed. 139, 25 S. C. 1; *Moxley v. Hertz*, 185 Fed. 585, 108 C. C. A. 95 (7th Cir.).

⁴ *McCray v. United States*, 195 U. S. 27, 49 L. ed. 91, 24 S. C. 769.

⁵ *Marhoeffer v. United States*, 241 Fed. 48, — C. C. A. — (7th Cir.).

⁶ *McCray v. United States*, *supra*. § 1443. ¹ Act of August 2, 1886, c. 840, § 9, 24 Stat. L. 211.

² See *infra*, § 1455.

§ 1444. Imported Oleomargarine.

All oleomargarine imported from foreign countries shall, in addition to any import duty imposed on the same, pay an internal revenue tax of fifteen cents per pound, such tax to be represented by coupon stamps as in the case of oleomargarine manufactured in the United States. The stamps shall be affixed and canceled by the owner or importer of the oleomargarine while it is in the custody of the proper custom-house officers; and the oleomargarine shall not pass out of the custody of said officers until the stamps have been so affixed and canceled, but shall be put up in wooden packages, each containing not less than ten pounds, as prescribed in this act for oleomargarine manufactured in the United States, before the stamps are affixed; and the owner or importer of such oleomargarine shall be liable to all the penal provisions of this act prescribed for manufacturers of oleomargarine manufactured in the United States. Whenever it is necessary to take any oleomargarine so imported to any place other than the public stores of the United States for the purpose of affixing and canceling such stamps, the collector of customs of the port where such oleomargarine is entered shall designate a bonded warehouse to which it shall be taken, under the control of such customs officer as such collector may direct; and every officer of customs who permits any such oleomargarine to pass out of his custody or control without compliance by the owner or importer thereof with the provisions of this section relating thereto, shall be guilty of a misdemeanor, and shall be fined not less than one thousand dollars nor more than five thousand dollars, and imprisoned not less than six months nor more than three years. Every person who sells or offers for sale any imported oleomargarine, or oleomargarine purporting or claimed to have been imported, not put up in packages and stamped as provided by this act, shall be fined not less than five hundred dollars nor more than five thousand dollars, and be imprisoned not less than six months nor more than two years.¹

§ 1445. Purchasing When Not Branded or Stamped.

Every person who knowingly purchases or receives for

§ 1444. ¹ Act of August 2, 1886, c. 840, § 10, 24 Stat. L. 211.

sale any oleomargarine which has not been branded or stamped according to law shall be liable to a penalty of fifty dollars for each such offense.¹

Persons prosecuted for a penalty under this section may waive a jury.²

§ 1446. Purchasing from Manufacturer Who Has Not Paid Tax.

Every person who knowingly purchases or receives for sale any oleomargarine from any manufacturer who has not paid the special tax shall be liable for each offense to a penalty of one hundred dollars, and to a forfeiture of all articles so purchased or received, or of the full value thereof.¹

§ 1447. Stamps on Emptied Packages Destroyed.

Whenever any stamped package containing oleomargarine is emptied, it shall be the duty of the person in whose hands the same is to destroy utterly the stamps thereon; and any person who willfully neglects or refuses so to do shall for each such offense be fined not exceeding fifty dollars, and imprisoned not less than ten days nor more than six months.. And any person who fraudulently gives away or accepts from another, or who sells, buys, or uses for packing oleomargarine, any such stamped package, shall for each such offense be fined not exceeding one hundred dollars, and be imprisoned not more than one year. Any revenue officer may destroy any emptied oleomargarine package upon which the tax-paid stamp is found.¹

An indictment for failure to destroy the stamp is not defective for failure to charge that the package was emptied while in the defendant's possession.² A manufacturer's stamped package is not "emptied", within this section, if it still contains a pound

§ 1445. ¹ Act of August 2, 1886, c. 840, § 11, 24 Stat. L. 211.

² Schick v. United States, 195 U. S. 65, 49 L. ed. 101, 24 S. C. 826.

§ 1446. ¹ Act of August 2, 1886, c. 840, § 12, 24 Stat. L. 211.

§ 1447. ¹ Act of August 2, 1886, c. 840, § 13, 24 Stat. L. 211.

² Ripper v. United States, 178 Fed. 24, 101 C. C. A. 152 (8th Cir.); Vermont v. United States, 174 Fed. 792, 98 C. C. A. 500 (8th Cir.).

package put up by the retailer of its original contents.³ The stamps will protect oleomargarine tubs only until the original contents are emptied. Thereafter it is the duty of the person in whose hands the tubs are, or of any revenue officer, to destroy the stamps thereon.⁴ To constitute an offense under this section the package must have had a stamp on it denoting the payment of a tax; it must have been emptied of its tax-paid contents; it must have been in that emptied condition in the defendant's possession; and he must have willingly neglected or refused to destroy the stamp while the empty package was in his possession.⁵

§ 1448. Chemists and Microscopist — Salary — Decisions.

There shall be in the office of the Commissioner of Internal Revenue an analytical chemist and a microscopist, who shall each be appointed by the Secretary of the Treasury, and shall each receive a salary of two thousand five hundred dollars per annum; and the Commissioner of Internal Revenue may, whenever in his judgment the necessities of the service so require, employ chemists and microscopists, to be paid such compensation as he may deem proper, not exceeding in the aggregate any appropriation made for that purpose. And such Commissioner is authorized to decide what substances, extracts, mixtures or compounds which may be submitted for his inspection in contested cases are to be taxed under this act; and his decision in matters of taxation under this act shall be final. The Commissioner may also decide whether any substance made in imitation or semblance of butter, and intended for human consumption, contains ingredients deleterious to the public health; but in case of doubt or contest his decisions in this class of cases may be appealed from to a board hereby constituted for the purpose, and composed of the Surgeon-General of the Army, the Surgeon-General of the Navy, and the Commissioner of Agriculture; and the decisions of this board shall be final in the premises.¹

³ United States v. Knott, 151 Fed. 925.

⁴ Kercheval v. Allen, 220 Fed. 262, — C. C. A. — (8th Cir.).

⁵ Vermont v. United States, *supra*.
§ 1448. ¹ Act of August 2, 1886,
c. 840, § 14, 24 Stat. L. 212.

§ 1449. **Oleomargarine — Forfeiture — Removal of Stamp.**

All packages of oleomargarine subject to tax under this act, that shall be found without stamps or marks as herein provided, and all oleomargarine intended for human consumption which contains ingredients adjudged, as hereinbefore provided, to be deleterious to the public health, shall be forfeited to the United States. Any person who shall willfully remove or deface the stamps, marks, or brands on package containing oleomargarine taxed as provided herein shall be guilty of a misdemeanor, and shall be punished by a fine of not less than one hundred dollars nor more than two thousand dollars, and by imprisonment for not less than thirty days nor more than six months.¹

An indictment alleging that the defendants willfully, etc., defaced the stamps, marks and brands upon two certain packages containing oleomargarine in their possession, but failing to show that the stamps removed were such as are prescribed by the statute, was held insufficient.² But in another case an indictment on similar facts was sustained.³

§ 1450. **Exportation — Regulations.**

Oleomargarine may be removed from the place of manufacture for export to a foreign country without payment of tax or affixing stamps thereto, under such regulations and the filing of such bonds and other security as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may prescribe. Every person who shall export oleomargarine shall brand upon every tub, firkin, or other package containing such article the word "oleomargarine", in plain Roman letters not less than one-half inch square.¹

§ 1451. **Fraud by Manufacturer.**

Whenever any person engaged in carrying on the business of manufacturing oleomargarine defrauds, or attempts to defraud, the United States of the tax on the oleomargarine

§ 1449. ¹ Act of August 2, 1886, c. 840, § 15, 24 Stat. L. 212.

² United States v. Joyce, 138 Fed. 457.

³ Wilkins v. United States, 96 Fed. 837, 37 C. C. A. 588 (3d Cir.).

§ 1450. ¹ Act of August 2, 1886, c. 840, § 16, 24 Stat. L. 212.

produced by him, or any part thereof, he shall forfeit the factory and manufacturing apparatus used by him, and all oleomargarine and all raw material for the production of oleomargarine found in the factory and on the factory premises, and shall be fined not less than five hundred dollars nor more than five thousand dollars, and be imprisoned not less than six months nor more than three years.¹

The essential elements of the offense defined in section 17 are: (1) That the defendant is engaged in carrying on the business of manufacturing oleomargarine. (2) That he has produced oleomargarine. (3) That he has attempted to defraud the United States.² When a defendant has produced oleomargarine with the intent to defraud the government out of the tax thereon, there is an attempt to defraud under this section although he has neither sold nor removed nor attempted to sell or remove any of the product.³ Mixing white oleomargarine with artificial coloration, so that it looks like butter, brings one within the definition of a manufacturer.⁴ The section is not limited to those who have received a license to manufacture oleomargarine.⁵ The offense defined by this section may be committed by a corporation.⁶ And an employee may be convicted of violating this section.⁷ No matter how active the coöperation of third persons, they are not subject to the penalties imposed by the act unless there is the concurring act of a person engaged in the business of manufacturing oleomargarine, and unless such third persons are charged with aiding and abetting, or otherwise are brought within section 332 of the Criminal Code.⁸ The section is directed at the principal, and does not, like many statutes, in terms make agents or employees of a principal or officers of a corporation liable as principal offenders. Therefore an indictment which does not follow the terms of the statute and charge directly that the

§ 1451. ¹ Act of August 2, 1886, c. 840, § 17, 24 Stat. L. 212.

² *May v. United States*, 199 Fed. 42, 117 C. C. A. 420 (8th Cir.).

³ *Ibid.*

⁴ *Ibid.*; *Hardesty v. United States*, 168 Fed. 25, 93 C. C. A. 417 (6th Cir.).

⁵ *May v. United States*, *supra*.

⁶ *United States v. Orr*, 223 Fed. 222.

⁷ *Marhoeffer v. United States*, 241 Fed. 48, — C. C. A. — (7th Cir.); *May v. United States*, *supra*.

⁸ *United States v. Orr*, *supra*.

defendants were engaged in carrying on the business of manufacturing oleomargarine, but qualifies the language of the statute by alleging that they, while engaged as officers, agents, and employees of a certain corporation, did, in their several capacities, carry on such business, without charging directly that the corporation carried on such business, was held insufficient.⁹ This objection would not apply to an indictment which did not allege that the defendants carried on the business in "their said several capacities" as officers of a corporation, but charged them individually as principals.¹⁰ In some instances indictments charging substantially in the language of the statute have been upheld.¹¹ An indictment following the language of the statute, and in addition describing the defendants, their place of business, the date and place where they conducted the business of manufacturing oleomargarine in violation of the law, and further defining with considerable particularity the steps taken that led up to and were a part of the alleged attempt to defraud the government out of the tax was held sufficient.¹² An indictment under section 17 is not objectionable for failure to allege the manner in which the attempt to defraud was made,¹³ or the particular acts relied upon to prove the attempt to defraud,¹⁴ or the specific means employed,¹⁵ or that the tax was assessable.¹⁶ Indictments charging violations of the act need not negative any of the exceptions in the statute.¹⁷ In a prosecution under this act it has been held that the government may prove the violation of a state statute prohibiting colored oleomargarine, for the purpose of showing guilty intent.¹⁸ But the soundness of this decision may well be doubted.

⁹ United States v. Orr, *supra*.

¹⁰ *Ibid*.

¹¹ Jelke v. United States, 255 Fed. 264, — C. C. A. — (7th Cir.), the report of which case contains the indictment (p. 266), and consult index Volume III for forms used in this case; United States v. New Jersey Melting, etc. Co., 141 Fed. 475.

¹² Marhoeffer v. United States, *supra*.

¹³ May v. United States, *supra*.

¹⁴ Hardesty v. United States, *supra*.

¹⁵ Enders v. United States, 187 Fed. 754, 109 C. C. A. 502 (7th Cir.).

¹⁶ *Ibid*.

¹⁷ Jelke v. United States, *supra*; Enders v. United States, *supra*; Hardesty v. United States, *supra*; May v. United States, *supra*.

¹⁸ Jelke v. United States, *supra*.

§ 1452. Failure to Comply with Law.

If any manufacturer of oleomargarine, any dealer therein or any importer or exporter thereof shall knowingly or willfully omit, neglect, or refuse to do, or cause to be done, any of the things required by law in the carrying on or conducting of his business, or shall do anything by this act prohibited, if there be no specific penalty or punishment imposed by any other section of this act for the neglecting, omitting, or refusing to do, or for the doing or causing to be done, the thing required or prohibited, he shall pay a penalty of one thousand dollars; and if the person so offending be the manufacturer of or a wholesale dealer in oleomargarine, all the oleomargarine owned by him, or in which he has any interest as owner, shall be forfeited to the United States.¹

§ 1453. Recovery of Fines.

All fines, penalties, and forfeitures imposed by this act may be recovered in any court of competent jurisdiction.¹

§ 1454. Regulations.

The Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may make all needful regulations for the carrying into effect of this act.¹

Authority is not given by this section to the treasury officials to make regulations that would destroy or undermine the act, or run counter to its provisions legally interpreted.²

§ 1455. Butter, Adulterated Butter, and Process or Renovated Butter — Definition.

For the purpose of this Act "butter" is hereby defined to mean an article of food as defined in "An Act defining butter, also imposing a tax upon and regulating the manufacture, sale, importation, and exportation of oleomargarine", approved August second, eighteen hundred and eighty-six:

§ 1452. ¹ Act of August 2, 1886, c. 840, § 18, 24 Stat. L. 212.

§ 1453. ¹ Act of August 2, 1886, c. 840, § 19, 24 Stat. L. 212.

§ 1454. ¹ Act of August 2, 1886, c. 840, § 20, 24 Stat. L. 212.

² *Moxley v. Hertz*, 185 Fed. 757, 108 C. C. A. 95 (7th Cir.).

that "adulterated butter" is hereby defined to mean a grade of butter produced by mixing, reworking, rechurning in milk or cream, refining, or in any way producing a uniform, purified, or improved product from different lots or parcels or melted or unmelted butter or butter fat, in which any acid, alkali, chemical, or any substance whatever is introduced or used for the purpose or with the effect of deodorizing or removing therefrom rancidity, or any butter or butter fat with which there is mixed any substance foreign to butter as herein defined, with intent or effect of cheapening in cost the product or any butter in the manufacture or manipulation of which any process or material is used with intent or effect of causing the absorption of abnormal quantities of water, milk, or cream; that "process butter" or "renovated butter" is hereby defined to mean butter which has been subjected to any process by which it is melted, clarified or refined and made to resemble genuine butter, always excepting "adulterated butter" as defined by this Act.¹

It has been held that butter containing an abnormal quantity of water is subject to the tax without regard to the intent of the manufacturer.² On the other hand, it was held that there must be an intent to cause the absorption of an abnormal quantity of water.³

§ 1456. Manufacturer's Statement of Business, Inventories, Books, Returns, and Signs.

Every manufacturer of process or renovated butter or adulterated butter shall file with the collector of internal revenue of the district in which his manufactory is located such notices, inventories, and bonds, shall keep such books and render such returns of material and products, shall put up such signs and affix such number of his factory, and conduct his business under such surveillance of officers and

§ 1455. ¹ Act of May 9, 1902, c. 784, § 4, 32 Stat. L. 194.

² *Coopersville Coöperative Creamery Co. v. Lemon*, 163 Fed. 145, 89 C. C. A. 595 (6th Cir.).

³ *Baldwin Coöperative Creamery*

Assn. v. Williams, 233 Fed. 607. See also *United States v. Eleven Thousand One Hundred and Fifty Pounds of Butter*, 195 Fed. 657, 115 C. C. A. 463 (8th Cir.).

agents as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may by regulation require. But the bond required of such manufacturer shall be with sureties satisfactory to the collector of internal revenue, and in a penal sum of not less than five hundred dollars; and the sum of said bond may be increased from time to time and additional sureties required at the discretion of the collector or under instructions of the Commissioner of Internal Revenue.¹

§ 1457. Adulterated Butter — Packing and Sale.

All adulterated butter shall be packed by the manufacturer thereof in firkins, tubs or other wooden packages not before used for that purpose, each containing not less than ten pounds, and marked, stamped, and branded as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe; and all sales made by manufacturers of adulterated butter shall be in original stamped packages. Dealers in adulterated butter must sell only original or from original stamped packages, and when such original stamped packages are broken the adulterated butter sold from same shall be placed in suitable wooden or paper packages, which shall be marked and branded as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe. Every person who knowingly sells or offers for sale, or delivers or offers to deliver, any adulterated butter in any other form than in new wooden or paper packages as above described, or who packs in any package any adulterated butter in any manner contrary to law, or who falsely brands any package or affixes a stamp on any package denoting a less amount of tax than that required by law, shall be fined for each offense not more than one thousand dollars and be imprisoned not more than two years.¹

§ 1458. Label and Notice on Package.

Every manufacturer of adulterated butter shall securely affix, by pasting, on each package containing adulterated

§ 1456. ¹ Act of May 9, 1902, c. 784, § 4, 32 Stat. L. 194.

§ 1457. ¹ Act of May 9, 1902, c. 784, § 4, 32 Stat. L. 194.

butter manufactured by him a label on which shall be printed, besides the number of the manufactory and the district and State in which it is situated, these words: "Notice.—That the manufacturer of the adulterated butter herein contained has complied with all the requirements of law. Every person is cautioned not to use either this package again or the stamp thereon, nor to remove the contents of this package without destroying said stamp, under the penalty provided by law in such cases." Every manufacturer of adulterated butter who neglects to affix such label to any package containing adulterated butter made by him, or sold or offered for sale for or by him, and every person who removes any such label so affixed from any such package shall be fined fifty dollars for each package in respect to which such offense is committed.¹

§ 1459. Tax on Adulterated or Renovated Butter — Stamps.

Upon adulterated butter, when manufactured or sold or removed for consumption or use, there shall be assessed and collected a tax of ten cents per pound, to be paid by the manufacturer thereof, and any fractional part of a pound shall be taxed as a pound, and that upon process or renovated butter, when manufactured or sold or removed for consumption or use, there shall be assessed and collected a tax of one-fourth of one cent per pound, to be paid by the manufacturer thereof, and any fractional part of a pound shall be taxed as a pound. The tax to be levied by this section shall be represented by coupon stamps, and the provisions of existing laws governing engraving, issuing, sale, accountability, effacement and destruction of stamps relating to tobacco and snuff, as far as applicable, are hereby made to apply to the stamps provided by this section.¹

§ 1460. Law as to Oleomargarine Applicable to Adulterated Butter.

The provisions of sections nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, eighteen, nineteen, twenty and twenty-one of "An Act defining butter, also imposing a tax upon and regulating the manu-

§ 1458. ¹ Act of May 9, 1902, c. 784, § 4, 32 Stat. L. 194.

§ 1459. ¹ Act of May 9, 1902, c. 784, § 4, 32 Stat. L. 194.

facture, sale, importation, and exportation of oleomargarine", approved August second, eighteen hundred and eighty-six, shall apply to manufacturers of "adulterated butter" to an extent necessary to enforce the marking, branding, identification and regulation of the exportation and importation of adulterated butter.¹

§ 1461. Sanitary Regulation of Renovated Butter Factories.

The sanitary provisions for slaughtering, meat, canning, or similar establishments, as set forth in the Act of June thirtieth, nineteen hundred and six (Thirty-fourth Statutes, page six hundred and seventy-six) are hereby extended to cover renovated butter factories as defined in the Act of May ninth, nineteen hundred and two (Thirty-second Statutes, page one hundred and ninety-six,) under such regulations as the Secretary of Agriculture may prescribe.¹

§ 1462. Wholesale Dealers — Books and Returns.

Wholesale dealers in oleomargarine, process, renovated, or adulterated butter shall keep such books and render such returns in relation thereto as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may, by regulation, require; and such books shall be open at all times to the inspection of any internal revenue officer or agent. And any person who willfully violates any of the provisions of this section shall for each such offense be fined not less than fifty dollars and not exceeding five hundred dollars, and imprisoned not less than thirty days nor more than six months.¹

The Internal Revenue Commissioner is authorized by this section to adopt a regulation requiring wholesale dealers to make monthly returns showing the packages and pounds of oleomargarine received, the quantity disposed of and names and addresses of the consignees. Such a regulation is not unreasonable because it does not apply to dealers in process, renovated, or adulterated

§ 1460. ¹ Act of May 9, 1902, c. 784, § 4, 32 Stat. L. 194.

§ 1462. ¹ Act of May 9, 1902, c. 784, § 6, 32 Stat. L. 197.

§ 1461. ¹ Act of August 10, 1912, c. 284, 37 Stat. L. 273.

butter.² The oath required by the regulations is to the recapitulation only and not to the list of customers contained in the return.³ A corporation is a "person" within the meaning of this section.⁴ The failure to make entries on the books of the number of packages and pounds disposed of at any specified time, on the same day or during the same month, is not a criminal offense under this section.⁵ The entries may be made by an agent of the dealer, and an indictment for failure to make such entries should allege that the dealer did not make and did not cause them to be made.⁶ The monthly returns of a manufacturer and wholesale dealer in oleomargarine have been held inadmissible to support charges of violations of the Oleomargarine Law.⁷

² United States v. Lawson, 173 Fed. 673.

³ *Ibid.*

⁴ United States v. Union Supply Co., 215 U. S. 50, 54 L. ed. 87, 30 S. C. 15.

⁵ United States v. Lawson, *supra*.

⁶ *Ibid.*

⁷ United States v. Elder, 232 Fed. 267.

CHAPTER LXXXIX

THE LEVER ACT

THE LEVER ACT AS ORIGINALLY PASSED

§ 1463. **An Act To Provide Further for the National Security and Defence by Stimulating Agriculture and Facilitating the Distribution of Agricultural Products.**

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That for the purpose of more effectually providing for the national security and defense and carrying on the war with Germany by gathering authoritative information concerning the food supply, by increasing production, by preventing waste of the food supply, by regulating the distribution thereof, and by such other means and methods as are hereinafter provided, the powers, authorities, duties, obligations, and prohibitions hereinafter set forth are conferred and prescribed.

SEC. 2. That the Secretary of Agriculture, with the approval of the President, is authorized to investigate and ascertain the demand for, the supply, consumption, costs, and prices of, and the basic facts relating to the ownership, production, transportation, manufacture, storage, and distribution of, foods, food materials, feeds, seeds, fertilizers, agricultural implements and machinery, and any article required in connection with the production, distribution, or utilization of food. It shall be the duty of any person, when requested by the Secretary of Agriculture, or any agent acting under his instructions, to answer correctly, to the best of his knowledge, under oath or otherwise, all questions touching his knowledge of any matter authorized to be investigated under this section, or to produce all books, letters, papers, or documents in his possession, or

under his control, relating to such matter. Any person who shall, within a reasonable time to be prescribed by the Secretary of Agriculture, not exceeding thirty days from the date of the receipt of the request, willfully fail or refuse to answer such questions or to produce such books, letters, papers, or documents, or who shall willfully give any answer that is false or misleading, shall be guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine not exceeding \$1000 or by imprisonment not exceeding one year, or both.

SEC. 3. That whenever the Secretary of Agriculture shall find that there is or may be a special need in any restricted area for seeds suitable for the production of food or feed crops, he is authorized to purchase, or contract with persons to grow such seeds, to store them, and to furnish them to farmers for cash, at cost, including the expense of packing and transportation.

SEC. 4. That the Secretary of Agriculture is authorized to cooperate with such State and local officials, and with such public and private agencies, or persons, as he finds necessary, and to make such rules and regulations as are necessary effectively to carry out the preceding sections of this Act.

SEC. 5. That the President, by and with the advice and consent of the Senate, may appoint two additional Assistant Secretaries of Agriculture, who shall perform such duties as may be required by law or prescribed by the Secretary of Agriculture, and who shall each be paid a salary of \$5000 per annum.

SEC. 6. That the President is authorized to direct any agency or organization of the Government to cooperate with the Secretary of Agriculture in carrying out the purposes of this Act and to coordinate their activities so as to avoid any preventable loss or duplication of work.

SEC. 7. That words used in this Act shall be construed to import the plural or the singular as the case demands, and the word "person", wherever used in this Act, shall include individuals, partnerships, associations, and corporations.

SEC. 8. That for the purposes of this Act, the following sums are hereby appropriated, out of any moneys in the Treasury not otherwise appropriated, available imme-

diately and until June thirtieth, nineteen hundred and eighteen: For the prevention, control, and eradication of the diseases and pests of live stock; the enlargement of live-stock production; and the conservation and utilization of meat, poultry, dairy, and other animal products, \$885,000.

For procuring, storing, and furnishing seeds, as authorized by section three of this Act, \$2,500,000, and this fund may be used as a revolving fund until June thirtieth, nineteen hundred and eighteen.

For the prevention, control, and eradication of insects and plant diseases injurious to agriculture, and the conservation and utilization of plant products, \$441,000.

For increasing food production and eliminating waste and promoting conservation of food by educational and demonstrational methods, through county, district, and urban agents and others, \$4,348,400.

For gathering authoritative information in connection with the demand for, and the production, supply, distribution, and utilization of food, and otherwise carrying out the purpose of section two of this Act; extending and enlarging the market news service; and preventing waste of food in storage, in transit, or held for sale; advise concerning the market movement or distribution of perishable products; for enabling the Secretary of Agriculture to investigate and certify to shippers the condition as to soundness of fruits, vegetables and other food products, when received at such important central markets as the Secretary of Agriculture may from time to time designate and under such rules and regulations as he may prescribe: *Provided*, That certificates issued by the authorized agents of the department shall be received in all courts as prima facie evidence of the truth of the statements therein contained; and otherwise carrying out the purposes of this Act, \$2,522,000: *Provided further*, That the Secretary of Agriculture shall, so far as practicable, engage the services of women for the work herein provided for.

For miscellaneous items, including the salaries of Assistant Secretaries appointed under this Act; special work in crop estimating; aiding agencies in the various States in supplying farm labor; enlarging the informational work

of the Department of Agriculture: and printing and distributing emergency leaflets, posters, and other publications requiring quick issue or large editions, \$650,000.

Provided, That the employment of any person under the provisions of this Act shall not exempt any such person from military service under the provisions of the selective draft law approved May eighteenth, nineteen hundred and seventeen.

It shall be the duty of the Secretary of Agriculture to submit to Congress at its regular session in December of each year a detailed report of the expenditure of all moneys herein appropriated.

SEC. 9. That the Act of August thirtieth, eighteen hundred and ninety, entitled "An Act providing for an inspection of meats for exportation, prohibiting the importation of adulterated articles of food or drink, and authorizing the President to make proclamation in certain cases, and for other purposes" (Twenty-sixth Statutes at Large, page four hundred and fourteen), is hereby amended so as to authorize the Secretary of Agriculture, within his discretion and under such joint regulations as may be prescribed by the Secretary of Agriculture and the Secretary of the Treasury, to permit the admission for immediate slaughter at ports of entry of tick-infested cattle which are otherwise free from disease and which have not been exposed to the infection of any other disease within sixty days next before their exportation from Mexico, South and Central America, the islands of the Gulf of Mexico and the Caribbean Sea into those parts of the United States below the southern cattle quarantine line at such ports of entry as may be designated by said joint regulations and also subject to the provisions of sections seven, eight, nine and ten of said Act of August thirtieth, eighteen hundred and ninety: *Provided*, That the importation of tick-infested cattle from any country referred to in this section in which foot-and-mouth disease exists, which existence shall be determined by the Secretary of Agriculture, is prohibited: *Provided further*, That all cattle imported under the provisions of this section shall be slaughtered in accordance with the provisions of the Act of June thirtieth, nineteen hundred

and six (Thirty-fourth Statutes at Large, page six hundred and seventy-four), commonly called the meat inspection amendment, and the rules and regulations promulgated thereunder by the Secretary of Agriculture, and that their hides shall be disposed of under rules and regulations to be prescribed by the Secretary of Agriculture.

SEC. 10. That section six of the Act of Congress approved June seventeenth, nineteen hundred and ten, "An Act to provide for an enlarged homestead", be, and the same is hereby, amended to read as follows :

"SEC. 6. That whenever the Secretary of the Interior shall find any tracts of land in the State of Idaho, subject to entry under this Act, do not have upon them such a sufficient supply of water suitable for domestic purposes as would make continuous residence upon the lands possible he may, in his discretion, designate such tracts of land, not to exceed in the aggregate one million acres, and thereafter they shall be subject to entry under this Act without the necessity of residence upon the land entered: *Provided*, That the entryman shall in good faith cultivate not less than one-sixteenth of the entire area of the entry which is susceptible of cultivation during the first year of the entry, not less than one-eighth during the second year, and not less than one-fourth during the third year of the entry and until final proof: *Provided further*, That after six months from the date of entry and until final proof the entryman shall be a resident of the State of Idaho."

SEC. 11. That the Secretary of the Interior is hereby authorized, in his discretion, to suspend during the continuance of this Act that provision of the Act known as the "Reclamation Act" requiring residence upon lands in private ownership or within the neighborhood for securing water for the irrigation of the same, and he is authorized to permit the use of available water thereon upon such terms and conditions as he may deem proper.

SEC. 12. That the provisions of this Act shall cease to be in effect when the national emergency resulting from the existing state of war shall have passed, the date of which shall be ascertained and proclaimed by the President; but the date when this Act shall cease to be in effect shall not be later than the beginning of the next fiscal year after

the termination, as ascertained by the President, of the present war between the United States and Germany.

Approved, August 10, 1917.

THE LEVER ACT AS AMENDED

§ 1464. **An Act To Amend an Act Entitled "An Act to Provide Further for the National Security and Defense by Encouraging the Production, Conserving the Supply, and Controlling the Distribution of Food Products and Fuel", Approved August 10, 1917, and to Regulate Rents in the District of Columbia.**

Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled, That this Act may be cited as "The Food Control and the District of Columbia Rents Act."

TITLE I.—FOOD CONTROL ACT AMENDMENTS

That section one of the Act entitled "An Act to provide further for the national security and defense by encouraging the production, conserving the supply, and controlling the distribution of food products and fuel", approved August 10, 1917, is hereby amended to read as follows :

"That by reason of the existence of a state of war, it is essential to the national security and defense, for the prosecution of the war and for the support and maintenance of the Army and Navy, to assure an adequate supply and equitable distribution, and to facilitate the movement of foods, feeds, wearing apparel, containers primarily designed or intended for containing foods, feeds, or fertilizers; fuel, including fuel oil and natural gas, and fertilizer and fertilizer ingredients, tools, utensils, implements, machinery, and equipment required for the actual production of foods, feeds, and fuel, hereafter in this Act called necessities; to prevent, locally or generally, scarcity, monopolization, hoarding, injurious speculation, manipulation, and private controls affecting such supply, distribution, and movement; and to establish and maintain governmental control of such necessities during the war. For such purposes the instrumentalities, means, methods, powers, authorities, duties, obligations, and prohibitions hereinafter set forth are created, established, conferred, and

prescribed. The President is authorized to make such regulations and to issue such orders as are essential effectively to carry out the provisions of this Act."

SEC. 2. That section 4 of such Act of August 10, 1917, is hereby amended to read as follows :

"That it is hereby made unlawful for any person willfully to destroy any necessities for the purpose of enhancing the price or restricting the supply thereof; knowingly to commit waste or willfully to permit preventable deterioration of any necessities in or in connection with their production, manufacture, or distribution; to hoard, as defined in section 6 of this Act, any necessities; to monopolize or attempt to monopolize, either locally or generally, any necessities; to engage in any discriminatory and unfair, or any deceptive or wasteful practice or device, or to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessities; to conspire, combine, agree, or arrange with any other person, (a) to limit the facilities for transporting, producing, harvesting, manufacturing, supplying, storing, or dealing in any necessities; (b) to restrict the supply of any necessities; (c) to restrict distribution of any necessities; (d) to prevent, limit, or lessen the manufacture or production of any necessities in order to enhance the price thereof; or (e) to exact excessive prices for any necessities, or to aid or abet the doing of any act made unlawful by this section. Any person violating any of the provisions of this section upon conviction thereof shall be fined not exceeding \$5000 or be imprisoned for not more than two years, or both: *Provided*, That this section shall not apply to any farmer, gardener, horticulturist, vineyardist, planter, ranchman, dairyman, stockman, or other agriculturist, with respect to the farm products produced or raised upon land owned, leased, or cultivated by him: *Provided further*, That nothing in this Act shall be construed to forbid or make unlawful collective bargaining by any coöperative association or other association of farmers, dairymen, gardeners, or other producers of farm products with respect to the farm products produced or raised by its members upon land owned, leased, or cultivated by them."

SEC. 3. That sections 8 and 9 of the Act entitled "An

Act to provide further for the national security and defense by encouraging the production, conserving the supply, and controlling the distribution of food products and fuel", approved August 10, 1917, be, and the same are hereby repealed: *Provided*, That any offense committed in violation of said sections 8 and 9, prior to the passage of this Act, may be prosecuted and the penalties prescribed therein enforced in the same manner and with the same effect as if this Act had not been passed.

TITLE II.—DISTRICT OF COLUMBIA RENTS

SEC. 101. When used in this title, unless the context indicates otherwise —

The term "rental property" means any building or part thereof or land appurtenant thereto in the District of Columbia rented or hired and the service agreed or required by law or by determination of the commission to be furnished in connection therewith; but does not include an hotel, or apartment.

The term "person" includes an individual, partnership, association, or corporation.

The term "hotel" or "apartment" means any hotel or apartment or part thereof, in the District of Columbia, rented or hired and the land and outbuildings appurtenant thereto, and the service agreed or required by law or by determination of the commission to be furnished in connection therewith.

The term "owner" includes a lessor or sublessor, or other person entitled to receive rent or charges for the use or occupancy of any rental property, hotel, or apartment, or any interest therein, or his agent.

The term "tenant" includes a subtenant, lessee, sublessee or other person, not the owner, entitled to the use or occupancy of any rental property, hotel, or apartment.

The term "service" includes the furnishing of light, heat, water, telephone or elevator service, furniture, furnishings, window shades, screens, awnings, storage, kitchen, bath and laundry facilities and privileges, maid service, janitor service, removal of refuse, making all repairs suited to the type of building or necessitated by ordinary wear and tear, and any other privilege or service

connected with the use or occupancy of any rental property, apartment, or hotel.

The term "commission" means the Rent Commission of the District of Columbia.

SEC. 102. A commission is hereby created and established, to be known as the Rent Commission of the District of Columbia, which shall be composed of three commissioners, none of whom shall be directly or indirectly engaged in, or in any manner interested in or connected with, the real estate or renting business in the District of Columbia. The commissioners shall be appointed by the President by and with the advice and consent of the Senate. The term of each commissioner shall be two years, except that any person chosen to fill a vacancy shall be appointed only for the unexpired term of the commissioner whom he succeeds. The commission shall at the time of its organization and annually thereafter elect a chairman from its own membership. The commission may make such regulations as may be necessary to carry this title into effect.

All powers and duties of the commission may be exercised by a majority of its members. A vacancy in the commission shall not impair the right of the remaining commissioners to exercise all the powers of the commission. The commission shall have an official seal, which shall be judicially noticed.

SEC. 103. Each commissioner shall receive a salary of \$5000 a year, payable monthly. The commission shall appoint a secretary, who shall receive a salary of \$3000 a year, payable in like manner; and, subject to the provisions of the civil-service laws, it may appoint and remove such officers, employees, and agents and make such expenditures for rent, printing, telegrams, telephone, law books, books of reference, periodicals, furniture, stationery, office equipment, and other supplies and expenses as may be necessary to the administration of this title. All of the expenditures of the commission shall upon the presentation of itemized vouchers therefor approved by the chairman of the commission be audited and paid in the same manner as other expenditures for the District of Columbia.

With the exception of the secretary, all employees of the commission shall be appointed from lists of eligibles sup-

plied by the Civil Service Commission and in accordance with the civil-service law.

SEC. 104. The assessor of the District of Columbia shall serve ex officio as an advisory assistant to the commission, but he shall have none of the powers or duties of a commissioner. He shall attend the meetings and hearings of the commission. Every officer or employee of the United States or of the District of Columbia, whenever requested by the commission, shall supply to the commission any data or information pertaining to the administration of this title which may be contained in the records of his office. The assessor shall receive for the performance of the duties required by this section a salary of \$1000 per annum, payable monthly, in addition to such other salary as may be prescribed for his office by law.

SEC. 105. For the purposes of this title the commission or any officer, employee, or agent duly authorized in writing by it, shall at all reasonable times have access to, for the purpose of examination, and the right to copy, any books, accounts, records, papers, or correspondence relating to any matter which the commission is authorized to consider or investigate; and the commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such books, accounts, records, papers, and correspondence relating to any such matter. Any member of the commission may sign subpoenas, administer oaths and affirmations, examine witnesses, and receive evidence.

Such attendance of witnesses and the production of such books, accounts, records, papers, and correspondence may be required from any place in the United States at any designated place of hearing. In case of disobedience to a subpoena or of the contumacy of any witness appearing before the commission, the commission may invoke the aid of the Supreme Court of the District of Columbia or of any district court of the United States. Such court may thereupon issue an order requiring the person subpoenaed to obey the subpoena, or to give evidence touching the matter in question. Any failure to obey such order of the court may be punished by such court as a contempt thereof. No officer or employee of the commission shall, unless au-

thorized by the commission or by a court of competent jurisdiction, make public any information obtained by the commission.

SEC. 106. For the purposes of this title it is declared that all (a) rental property and (b) apartments and hotels are affected with a public interest, and that all rents and charges therefor, all service in connection therewith, and all other terms and conditions of the use or occupancy thereof, shall be fair and reasonable; and any unreasonable or unfair provision of a lease or other contract for the use or occupancy of such rental property, apartment, or hotel with respect to such rents, charges, service, terms, or conditions is hereby declared to be contrary to public policy. The commission upon its own initiative may, or upon complaint shall, determine whether the rent, charges, service, and other terms or conditions of a lease or other contract for the use or occupancy of any such rental property, hotel, or apartment are fair and reasonable. Such complaints may be made (a) by or on behalf of any tenant, and (b) by any owner except where the tenant is in possession under a lease or other contract, the term specified in which has not expired, and the fairness and reasonableness of which has not been determined by the commission.

In all such cases the commission shall give notice personally or by registered mail and afford an opportunity to be heard to all parties in interest. The commission shall promptly hear and determine the issues involved in all complaints submitted to it. All hearings before the commission shall be open to the public. If the commission determines that such rents, charges, service, or other terms or conditions are unfair or unreasonable, it shall determine and fix such fair and reasonable rent or charges therefor, and fair and reasonable service, terms, and conditions of use or occupancy. In any suit in any court of the United States or the District of Columbia involving any question arising out of the relation of landlord and tenant with respect to any rental property, apartment, or hotel, except on appeal from the commission's determination as provided in this title, such court shall determine the rights and duties of the parties in accordance with the determination and regulations of the commission relevant thereto.

SEC. 107. A determination of the commission fixing a fair and reasonable rent or charge made in a proceeding begun by complaint shall be effective from the date of the filing of the complaint. The difference between the amount of rent and charges paid for the period from the filing of the complaint to the date of the commission's determination and the amount that would have been payable for such period may be added to or subtracted from, as the case demands, future rent payments, or after the final decision of an appeal from the commission's determination may be sued for and recovered in an action in the Municipal Court of the District of Columbia.

SEC. 108. Unless within ten days after the filing of the commission's determination any party to the complaint appeals therefrom to the Court of Appeals of the District of Columbia, the determination of the commission shall be final and conclusive. If such an appeal is taken from the determination of the commission, the record before the commission or such part thereof as the court may order shall be certified by it to the court and shall constitute the record before the court, and the commission's determination shall not be modified or set aside by the court, except for error of law. If any party applies to the court for leave to adduce additional evidence and shows to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the commission, the court may order such additional evidence to be taken before the commission and to be adduced upon the hearing in such manner and upon such terms and conditions as the court may deem proper. The commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which shall be conclusive, and its recommendations if any for the modification or setting aside of its original determination, with the return of such additional evidence. In the proceedings before such court on appeal from a determination of the commission, the commission shall appear by its counsel or other representative and submit oral or written arguments to support the findings and the determination of the commission.

SEC. 109. The right of a tenant to the use or occupancy of any rental property, hotel, or apartment, existing at the time this Act takes effect, or thereafter acquired, under any lease or other contract for such use or occupancy or under any extension thereof by operation of law, shall, notwithstanding the expiration of the term fixed by such lease or contract, continue at the option of the tenant subject, however, to any determination or regulation of the commission relevant thereto; and such tenant shall not be evicted or dispossessed so long as he pays the rent and performs the other terms and conditions of the tenancy as fixed by such lease or contract, or in case such lease or contract is modified by any determination or regulation of the commission, then as fixed by such modified lease or contract. All remedies of the owner at law or equity, based on any provision of any such lease or contract to the effect that such lease or contract shall be determined or forfeited if the premises are sold, are hereby suspended so long as this title is in force. Every purchaser shall take conveyance of any rental property, hotel, or apartment subject to the rights of tenants as provided in this title. The rights of the tenant under this title shall be subject to the limitation that the bona fide owner of any rental property, apartment, or hotel shall have the right to possession thereof for actual and bona fide occupancy by himself, or his wife, children, or dependents, or for the purpose of tearing down or razing the same in order immediately to construct new rental property, hotel, or apartment if approved by the commission, upon giving thirty days' notice in writing, served in the manner provided by Section 1223 of the Act entitled "An Act to establish a code of laws for the District of Columbia", approved May 3, 1901, as amended, which notice shall contain a full and correct statement of the facts and circumstances upon which the same is based; but in no case shall possession be demanded or obtained by such owner in contravention of the terms of any such lease or contract. If there is a dispute between the owner and the tenant as to the accuracy or sufficiency of the statement set forth in such notice, as to the good faith of such demand, or as to the service of notice, the matters in dispute shall be determined by the commis-

sion upon complaint as provided in Section 106 of this title.

SEC. 110. Pending the final decision on appeal from a determination of the commission, the commission's determination shall be in full force and effect and the appeal shall not operate as a supersedeas or in any manner stay or postpone the enforcement of the determination appealed from. Immediately upon the entry of a final decision on the appeal the commission shall, if necessary, modify its determination in order to make it conform to such decision. The difference, if any, between the amount of rent and charges paid for the period from the date of the filing by the commission of the determination appealed from and the amount that would have been payable for such period under the determination as modified in accordance with the final decision on appeal may be added to or allowed on account of, as the case demands, future rent payments or may be sued for and recovered in an action in the Municipal Court in the District of Columbia.

SEC. 111. The determination of the commission in a proceeding begun by complaint or upon its own initiative fixing fair and reasonable rents, charges, service, and other terms and conditions of use or occupancy of any rental property, hotel, or apartment shall constitute the commission's determination of the fairness and reasonableness of such rents, charges, service, terms, or conditions for the rental property, hotel, or apartment affected, and shall remain in full force and effect notwithstanding any change in ownership or tenancy thereof, unless and until the commission modifies or sets aside such determination upon complaint either of the owner or of the tenant.

SEC. 112. If the owner of any rental property, apartment, or hotel collects any rent or charge therefor in excess of the amount fixed in a determination of the commission made and in full force and effect in accordance with the provisions of this title, he shall be liable for and the commission is hereby authorized and directed to commence an action in the Municipal Court in the District of Columbia to recover double the amount of such excess, together with the costs of the proceeding which shall include an attorney's fee of \$50, to be taxed as part of the costs. Out of any sums

received on account of such recovery the commission shall pay over to the tenant the amount of the excess so paid by him and the balance shall be paid into the Treasury of the United States to the credit of the District of Columbia: *Provided*, That if the commission finds that such excess was paid by the tenant voluntarily and with knowledge of the commission's determination, the whole amount of such recovery shall be paid into the Treasury of the United States to the credit of the District of Columbia.

SEC. 113. If in any proceeding before the commission, begun by complaint or on the commission's own initiative, and involving any lease or other contract for the use or occupancy of any rental property, hotel, or apartment the commission finds that at any time after the passage of this Act but during the tenancy the owner has, directly or indirectly, willfully withdrawn from the tenant any service agreed or required by a determination of the commission to be furnished, or has by act, neglect, or omission contrary to such lease or contract or to the law or any ordinance or regulation made in pursuance of law, or of a determination of the commission, exposed the tenant, directly or indirectly, to any unsafe or insanitary condition or imposed upon him any burden, loss, or unusual inconvenience in connection with his use or occupancy of such rental property, hotel, or apartment, the commission shall determine the sum which in its judgment will fairly and reasonably compensate or reimburse the tenant therefor. In any such proceeding involving a lease or other contract, the term specified in which had not expired at the time the proceeding was begun, the commission shall likewise determine the amount or value of any bonus or other consideration in excess of the rental named in such lease or contract received at any time directly or indirectly by the owner in connection with such lease or contract. The tenant may recover any amount so determined by the commission in an action in the Municipal Court of the District of Columbia.

SEC. 114. Whenever under this title a tenant is entitled to bring suit to recover any sum due him under any determination of the commission, the commission shall, upon application by the tenant and without expense to him, commence and prosecute in the municipal court of the Dis-

trict of Columbia an action on behalf of the tenant for the recovery of the amount due, and in such case the court shall include in any judgment rendered in favor of the tenant the costs of the action, including a reasonable attorney's fee, to be fixed by the court. Such costs and attorney's fee when recovered shall be paid into the Treasury of the United States to the credit of the District of Columbia.

SEC. 115. The commission shall, by general order, from time to time prescribe the procedure to be followed in all proceedings under its jurisdiction. Such procedure shall be as simple and summary as may be practicable, and the commission and parties appearing before it shall not be bound by technical rules of evidence or of pleading.

SEC. 116. Any person who with intent to avoid the provisions of this title enters into any agreement or arrangement for the payment of any bonus or other consideration in connection with any lease or other contract for the use or occupancy of any rental property, hotel, or apartment, or who participates in any fictitious sale or other device or arrangement the purpose of which is to grant or obtain the use of occupancy of any rental property, hotel, or apartment without subjecting such use or occupancy to the provisions of this title or to the jurisdiction of the commission shall upon conviction be punished by a fine not exceeding \$1000 or by imprisonment for not exceeding one year or by both.

SEC. 117. The commission shall prescribe standard forms of leases and other contracts for the use or occupancy of any rental property, hotel, or apartment and shall require their use by the owner thereof. Every such lease or contract entered into after the commission has prescribed and promulgated a form for the tenancy provided by such lease or contract shall be deemed to accord with such standard form; and any such lease or contract in any proceeding before the commission or in any court of the United States or of the District of Columbia shall be interpreted, applied, and enforced in the same manner as if it were in the form and contained the stipulations of such standard form.

The owner of an hotel or apartment shall file with the commission plans and other data in such detail as the commission requires, descriptive of the rooms, accommo-

dations and service in connection with such hotel or apartment, and a schedule of rates and charges therefor. The commission shall, after consideration of such plans, schedules, data, or other information, determine and fix a schedule of fair and reasonable rates and charges for such hotels or apartments; and the rates and charges stated in such schedule shall thereafter constitute the fair and reasonable rates and charges for such hotel or apartment. The commission's determination in such case shall be made after such notice and hearing and shall have the same force and effect and be subject to appeal in the same manner as a determination of the commission under Section 106 of this title.

SEC. 118. No tenant shall assign his lease of or sublet any rental property or apartment at a rate in excess of the rate paid by him under his lease without the consent of the commission upon application in a particular case, and in such case the commission shall determine a fair and reasonable rate of rent or charge for such assignment or sublease.

SEC. 119. The public resolution entitled "Joint resolution to prevent profiteering in the District of Columbia", approved May 31, 1918, as amended, is hereby repealed, to take effect sixty days after the date of the confirmation by the Senate of the commissioners first nominated by the President under the provisions of this title; but a determination by the commission made within such period of sixty days shall be enforced in accordance with the provisions of this title, notwithstanding the provisions of such public resolution. All laws or parts of laws in conflict with any provisions of this title are hereby suspended so long as this title is in force to the extent that they are in such conflict.

SEC. 120. The sum of \$50,000, or so much thereof as may be necessary, is hereby appropriated and made immediately available to carry out the provisions of this title, one-half thereof to be paid out of money in the Treasury of the United States not otherwise appropriated and the other one-half out of the revenues of the District of Columbia.

SEC. 121. If any clause, sentence, paragraph, or part of this title shall be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect,

impair, or invalidate the remainder thereof, but shall be confined in its operations to the clause, sentence, paragraph, or part thereof directly involved in the controversy in which such judgment shall have been rendered.

SEC. 122. It is hereby declared that the provisions of this title are made necessary by emergencies growing out of the war with the Imperial German Government, resulting in rental conditions in the District of Columbia dangerous to the public health and burdensome to public officers and employees whose duties require them to reside within the District and other persons whose activities are essential to the maintenance and comfort of such officers and employees, and thereby embarrassing the Federal Government in the transaction of the public business. It is also declared that this title shall be considered temporary legislation, and that it shall terminate on the expiration of two years from the date of the passage of this Act, unless sooner repealed.

Approved, October 22, 1919.

On May 26, 1920, the United States Circuit Court of Appeals for the Second Circuit¹ sustained the constitutionality of the Lever Act; while the Supreme Court of the District of Columbia and Judge Anderson of the United States District Court for the District of Indiana held certain portions of said Act to be unconstitutional. In another case in the Second Circuit,² Judge Mack, on June 11, 1920, held that the Lever Act as amended does not apply to raw material but only to finished products. There are now pending in the Supreme Court of the United States six cases involving the constitutionality and the construction of the Lever Act which the Court has set down for hearing for October 11, 1920. Pending these cases comment by the author on this act has been withheld. The validity of the Lever Act in all of these cases has been challenged on the ground that it deprives persons and corporations of their property without due process of law and without adequate compensation.

¹ *Weed v. Lockwood*.

² *United States v. Isaac N. Wood*.

